15—167

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 268.

JAMES S. PHILIPPI, APPELLANT,

vs.

ANTONIO PHILIPPE, ANTONIO PHILIPPI, EUGENE PHILIPPI, ANGELA F. PHILIPPI, PERSONALLY AND AS ADMINISTRATRIX OF ANGELO M. PHILIPPI, DECEASED, LOUIS PHILIPPI, ANGELO PHILIPPI, AND LOUISA PHILIPPI.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

FILED SEPTEMBER 16, 1882

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1 *Bill.*

In the Circuit Court of the United States for the Southern District of Alabama, Fifth Judicial Circuit.

JAMES S. PHILIPPE, Complainant, *vs.* ANTONIO PHILIPPE *et al.*, Respondents. } In Equity. Bill for an Accounting, etc.

To the judges of the circuit court of the United States for the southern district of Alabama, in the 5th judicial circuit:

James Saint Philippi, of the city of New Orleans, in the State of Louisiana, and a citizen of the State of Louisiana, brings this his bill against Antonio Philippe, Angela Francheschi Philippi, individually and as administratrix of Angelo Maria Philippi (otherwise written Filippi), deceased, Antonio Philippi, adults, who are residents of the port of Mobile, in the State of Alabama, and are citizens of the State of Alabama; Eugene Philippi, adult, who resides in the city of Montgomery, in the State of Alabama, and is a citizen of the State of Alamama; and Louis Philippi, Angelo Philippi, and Louisa Philippi, who are minors under the age of fourteen years, residing with their mother, the said Angela Francheschi Philippi, and are citizens of the State of Alabama. And thereupon your orator complains and says that:

1st. Your orator is the son of Angelo Maria Philippi (otherwise written Filippi), deceased, by the defendant, Angela Francheschi Philippi (or Filippi).

2d. That said defendant, Angela F. Philippi (or Filippi), is the widow of said Angelo M. Philippi (or Filippi), deceased; and all the other defendants, except the defendant first named, to wit,

2 Antonio Philippi, are the children of said Angelo M. Philippi (or Filippi), deceased, by said Angela F. Philippi (or Filippi), and no guardian has been appointed for such of said children as are under the age of twenty-one years.

3d. That said defendant first named, Antonio Philippe, is the younger brother of said Angelo M. Philippi, deceased.

4th. That said Angelo M. Philippi, deceased, was a native of the island of Corsica, in France, and came to this country and settled in Mobile about the year A. D. 1835, and was naturalized as a citizen of the United States on the 12th day of December, A. D. 1840, and that he died in the then city of Mobile, in this State, on the first day of May, A. D. 1874, intestate; and that letters of administration upon his estate were granted to the defendant, Angela F. Philippi, by the probate court of Mobile county on the 27th day of March, A. D. 1877.

5th. That said Angelo Mario Philippi (or Filippi), deceased, during his lifetime carried on the business of a boarding-house and saloon-keeper from about the time of his arrival in Mobile, and was very successful in the same, so that in the year 1840 he was in thriving circumstances, and had begun to be deemed a man of means.

6th. That in or about the year 1840 or 1841 the defendant, Antonio Philippe, came to the said city of Mobile, and was then in apparently

very humble circumstances; that for several months after his arrival he was without employment; and that his brother, the said Angelo M., gave him employment out of motives of brotherly love and affection, and associated said defendant with himself in keeping the liquor saloons in the said city of Mobile known as the "Rialto,"
3 then situated on the southwest corner of St. Emanuel and Conti streets, and later the saloons situated respectively on the southwest corner of Royal and St. Michael streets, and in the building on the northwest corner of St. Michael and Royal streets, then occupied as a theatre, and, finally, in or about the year 1843, in the tenement on the northwest corner of Royal and Conti streets, which were all then amongst the most frequented saloons in the said city of Mobile; that the relations between the said brothers were amiable and harmonious from said year 1840 or 1841 until after the return of said Angelo M. Philippi from Europe, in December, 1856, as hereinafter related; that said business was extremely profitable; and that in the year 1845 said Angelo M. Philippi was reputed and deemed to be, in the opinion of his acquaintances, in very prosperous circumstances.

7th. Orator further says that during or about the year 1845 said Angelo M. Philippi (or Filippi), deceased, returned to France on a visit, and thereupon placed all of the said business affairs and property and his money in the keeping of his brother, the said defendant, Antonio Philippe, to manage and conduct for him, and to invest for him, and to invest the income and profits thereof.

8th. Your orator charges that said defendant, Antonio Philippe, expressly accepted said trust, and took charge of said property, affairs, and money of said Angelo, and evidenced — acknowledged the trusts in letters addressed to said Angelo, signed by himself, to wit, in a letter dated at Mobile, May 5, 1847, in which said defendant acknowledged he held in his hands the sum of ten thousand
4 dollars belonging to said Angelo, and in which said defendant, Antonio Philippe, further acknowledged the purchase four days previously of the building on Dauphin street, in which George Cullom then kept his coffee-saloon, and which was then worth a yearly rental of eight hundred dollars; also in a letter addressed to said Angelo, dated at Mobile, March 7, 1848, in which said defendant acknowledged that he had closed the account between them on the first of November for that year, and that the profits of the affairs for that year in which he and said Angelo were jointly interested were eight thousand dollars, four thousand dollars of which said defendant acknowledged he had set down to Angelo's credit; and in said letter said defendant also enumerated six houses as belonging to him and said Angelo jointly, amongst them the house in which said defendant was then living, costing thirteen thousand dollars; one house built on Dauphin street, costing seven thousand dollars, and one on the same street where Cullom was then keeping a coffee-saloon, costing six thousand dollars; and in said letter defendant also acknowledges that the negroes belonging to the joint estate of himself and said Angelo give a yearly income of four thousand dollars, independent of the profits of trading. Orator charges that all

of the aforesaid letters written by the said defendant breathe a spirit of brotherly affection, tending to prevent any apprehension on the part of said Angelo that his brother, the said defendant Antonio, would not render a true and just account of all the trusts reposed in him by said Angelo whenever the latter should return to Mobile or demand his share of said investments and profits. And orator charges that said defendant has not since disavowed the trusts acknowledged by said letters.

8. Your orator further charges that said defendant, Antonio Philippe, took the conveyances of the six houses referred to in said letter of 7th March, 1848, to himself alone in fee-simple, and that the more particular description of them is as follows, to wit:

a. The double tenement and lands on the northwest corner of St. Francis street and Jackson street, in the port of Mobile, more particularly described in a deed made on the 3rd January, 1846, by Edmund Ponchet and wife, William Bryden, and Catherine Fife, for the sum 3,200 dollars, conveying the same to Antonio Philippe, which is recorded in the office of the probate judge for Mobile county in deed-book No. 10, at pages 308, 309, 310; also described in a deed made on the 10th January, 1846, by Don Miguel Eslava to Antonio Philippi for the sum of 773 dollars, conveying his interest in said property, which is recorded in the office of the said probate judge in book of deeds No. 10, at page 310, which records are prayed to be referred to for a more particular description of said lands.

b. The premises on the north side of Dauphin street, in the port of Mobile, between Conception and Joachim streets, now known as No. 110 Dauphin street, which was conveyed to Antonio Philippi by Douglass W. Starke and wife for the sum of 775 dollars, by deed made on the 19th March, 1847, which is recorded in the office of the said probate judge in book of deeds 11, at page 462, to which record reference is prayed to be made for a more particular description of said land.

c. The two brick stores on the north side of Dauphin street, between Water and Commerce streets, in the port of Mobile, then occupied by George Cullom and Thomas Mullen, respectively, conveyed to Antonio Philippi by the commissioners of the estate of John Eliot, by a deed made on the 3rd May, 1847, for the sum of 4,000 dollars, which is recorded in the office of said probate judge, in deed-book No. 11, at pages 499 & 500, which record is prayed to be referred to for a more particular description of said premises.

d. The brick building at the northwest intersection of Royal and Conti streets, in the port of Mobile, in which was then kept the saloon belonging to said Angelo and Antonio, conveyed to Antonio Philippi by Jonathan Emanuel and wife for the sum of 10,000 dollars, by deed made on the 16th February, 1848, and recorded in the office of probate judge in deed-book No. 13, at pages 309, 310, to which record reference is prayed to be made for a more particular description of said premises.

9. Orator charges that besides the six houses specially referred to in the aforesaid letter of March 7, 1848, and set out in the preceed-

ing paragraph, the said defendant prior to the date of said letter had caused to be conveyed to himself, in fee-simple, lands purchased with moneys belonging to the said trust, as follows:

a. The lands in Mobile county conveyed to Antonio Philippi by Benj. Dewal, Jr., by deed made on the 17th October, 1845, for 1,500 dollars, comprising $600\frac{96}{100}$ acres, which deed is recorded in the office of said probate judge, in deed-book 10, at page 313, to which
7 reference is prayed to be made for more particular description.

b. Also six (6) lots and one-half ($\frac{1}{2}$) lot in the city of Mobile, (now port of Mobile) conveyed by Benjamin Dewal, Jr., to Antonio Philipe, for the sum of 600 dollars, by deed made on the 3rd April, 1846, which is recorded in the aforesaid office in deed-book 11, at page 64, which record is prayed to be referred to for more particular description of said lands.

10. Your orator further charges that no settlement was ever made by said defendant, Antonio Philippe, of the trusts and partnership affairs evidenced by the aforesaid writings, nor has any partition been had of said real estate; but said defendant Antonio has ever since continued in the absolute possession of all of said trust and partnership property, and has never rendered any statement of account for final settlement of said trust and partnership affairs, and has always enjoyed, and still continues to enjoy, the use of all the real property, money, and other assets of said trust and partnership affairs, and all the rents, incomes, and profits therefrom arising. And orator charges that said partnership has never been dissolved otherwise than by the death of said Angelo M. Philippi, and was never insolvent, and that there are no debts outstanding against the same; and that no account has ever been had of the same between the said defendant and said Angelo, his brother, deceased, or the heirs or administratrix of said deceased, or any one of them, and no final division has ever been made of the partnership assets, and that all of the books, accounts, papers, and assets belonging
8 to the said partnership are now in the hands of the said defendant or subject to his control. And your orator further charges that none of the trusts hereinbefore described and acknowledged by said writings other than the said saloon and other partnership affairs in which said defendant Antonio was trustee for his brother, the said Angelo, deceased, have ever been closed or extinguished.

11. Your orator charges: that said defendant, Antonio Philippe, has had no source of gain, income, or profit since coming to Mobile in 1840, or thereabouts, other than such as arose from the hereinbefore-described "saloon" business and the other affairs had in partnership with his brother, said Angelo, deceased, or arose from the trusts hereinbefore described, or from the rents, income, and profits thereof and the investments made by said defendant of the same. And your orator further charges and says that whereas the said defendant Antonio, at the time of his arrival in Mobile, in 1840 or 1841, was in apparently humble circumstances, and was so reputed to be, and so continued until after the departure of his brother, said Angelo, de-

ceased, for Europe, in 1845, nevertheless he is now reputed to be a man of large wealth, and is such, and is assessed upon the books of assessment of the State and county tax assessor of Mobile county for the year 1879 as the owner of fourteen lots of land of the aggregate value of fifty-one thousand seven hundred fifty dollars ($51,750.)

12. Your orator further charges and says that since the date of the writing before described as made March 7th, 1848, in which said defendant acknowledged the trusts hereinbefore referred to, said defendant purchased and took deeds of conveyance to himself alone in fee-simple of the various parcels of lands more particularly described in the exhibit, marked "A," hereunto annexed, which is prayed to be taken as a part of this bill. Your orator charges that the consideration given by said defendant for said lands was moneys arising out of and belonging to said partnership and trust affairs referred to in said letters, dated May 5, 1847, and March 7, 1848.

13. Your orator says that said Angelo M. Philippi, deceased, returned from Europe in December, 1856, and charges that said defendant, hisbrother, never denied to him the admissions made in said letters of May 5th, 1847, and March 7th, 1848, or repudiated the trusts therein acknowledged, but promised to render a true and just account of the said partnership and trust affairs to his brother, said Angelo, and to make a final settlement of the same; but said defendant delayed doing so from time to time, and has failed as yet to make said statement of account and to make said final settlement.

14. Your orator further shows that said Angelo M. Philippi, deceased, was but imperfectly acquainted with the language of this country and of its laws; that he was a man of reserved ways and of few intimacies, and these wholly among his own countrymen, who, as a class, were almost all, like said Angelo, exclusively engaged in pursuits in said city, requiring for their prosecution only an imperfect knowledge of the law and language of this country; that the letters above referred to, as well as the correspondence generally between the said defendant and his said brother, were written in a dialect of the Italian language exclusively; that said letters were therefore intelligible only to the countrymen of said Angelo among his acquaintances, and that therefore said Angelo never became fully aware of the extent of his rights at law and equity, or the means at his disposal to compel the fulfillment of said defendant's promise to render an account and make a final settlement of the said partnership and trust affairs.

15. Your orator further shows that upon said Angelo's return from Europe in December, 1856, he was possessed of but scanty immediate means, whilst the defendant, Antonio Philippe, his brother, had at his disposal much wealth. Your orator further shows that said Angelo remained thereafter, until his decease, in a condition of poverty, and at times almost of distress. Orator further shows that said Angelo repeatedly declared that the thought of a suit at law with his brother was repulsive to him, and that he always expected that said defendant, his brother, would at some time render him an

account of his affairs and make a settlement with him of the partnership and trust transactions before described; that should said defendant fail to do this during his, Angelo's, lifetime, that his children, after his death, would not be restrained, as he was, by his relations to the said defendant as his brother, from compelling, if possible, said defendant to render said account and make said settlement as promised.

And your orator therefore prays that the defendant, Antonio Philippe, may be required, by decree of this honorable court, to make a full and true discovery of all the matters aforesaid, and to render an account of all the real and personal estate received by
11 him from the said Angelo Maria Philippi (or Filippi), or acquired by the said defendant by the administration and management of the affairs and business entrusted to him by said Angelo, and to disclose the manner in which he has conducted said affairs from the beginning to the present time, and to set out and describe all the investments he has made from time to time in real or personal property, of the gains, income, and profits arising from his administration of said affairs, and to disclose what has become of said investments and where he has sold the same; to account for the proceeds arising therefrom, and particularly to set forth and declare what disposition he has made of the sum of ten thousand dollars, which he acknowledged to have been in his hands in trust for said Angelo M. Philippi on the fifth day of May, 1847; and of the sum of four thousand dollars, charged by complainants to be the share of said Angelo, and so acknowledged by said defendant, of the earnings for the year ending November 1st, 1847, of the partnership between him and said defendant; and of the share which he, the said defendant, held in or about the year 1848 as the property of himself and his said brother Angelo; and of the hire of the said slaves, or of the proceeds of the sale of said slaves, if it shall appear that he sold them; and of the disposition which the said defendant has made of the six houses and lots which your orator has charged the said defendant held in the year 1848 for himself and in trust for his said brother Angelo, and of the rents, incomes, and profits thereof; and what disposition or investment he has made of the gains and profits arising from the partnership business which the said defendant conducted for himself and said Angelo M. Philippi; and that said defendant may discover and describe each and every piece of
12 real estate which he has purchased with funds arising from all or any of the sources referred to, or from his administration of said affairs left in his charge by said Angelo since the year 1845, showing how he took the titles thereto, what he paid for the same, and when and the sums for which he sold the same, and also a true account of all the rents, issues, and profits arising therefrom; and that said defendant may in like manner disclose what personal property he now has which has been purchased with funds arising from any of said sources, and the value thereof; and that said defendant may be required to set forth a list or schedule and description of every deed, book account, letter, paper, or writing relating to the partnership or trust affairs aforesaid, or wherein or whereupon

there is any note, memorandum, or writing relating thereto, and that he may be required to deposit with the master of this court all of such deeds, books, accounts, letters, papers, or writings as are in his possession, and to account for such as are not now in his possession or under his control.

And your orator further prays that your honors will cause an account to be taken, by the master of this court, of all the affairs of the said partnership between the defendant aforesaid and his brother, the said Angelo M. Philippi, and of its stock and assets, and of its gains and profits, and of the monies, goods, or other things paid over or delivered to or received by each of said partners, and of the investments of such moneys, gains, and profits, or of said Angelo's share thereof, made by said defendant from time to time, and of what the same now consists, and of the value thereof; and that said master may further take an account of all lands, slaves, money, and other property placed by said Angelo in the hands of the said defendant in trust for himself as aforesaid; and of the rents,
13 issues, profits, and proceeds thereof which have been received by said defendant from time to time, and of the investments of all such moneys, rents, issues, profits, and proceeds made by said defendant from time to time, and of what the same now consists, and of the value thereof.

And your orator further prays that your honors will make a decree declaring the said partnership to have been dissolved only by the death of said Angelo M. Philippi, and requiring the said defendant to deliver to the defendant, Angela F. Philippi, as the administratrix of said Angelo M. Philippi, deceased, one-half of all the assets thereof, of whatever the same may be found to consist, or to pay to her the just value of the same; and to pay over to said administratrix the said Angelo's share of all the gains and profits of said partnership, with the proper interest thereon.

And your orator further prays that your honors will, by a decree of this honorable court, compel the said defendant, Antonio Philippe, to surrender and give up to your orator, James Saint Philippi, and to the defendants, Antonio Philippi, Eugene Philippi, Louis Philippi, Angelo Philippi, and Louisa Philippi, the children and heirs of said Angelo Maria Philippi, deceased, all of such lands now in the possession of said defendant, Antonio Philippe, as have been purchased by him in his own name, with trust funds belonging wholly to said Angelo, or with said Angelo's share of the rents, issues, profits, or proceeds of any property belonging jointly to said defendant and said Angelo, or with the said Angelo's share of the profits of said partnership business; and that your honors will decree and order a partition between said defendant and the said heirs of Angelo M. Philippi, deceased, of all the
14 lands to which said defendant, Antonio Philippi, now hold title in his own name, which have been purchased with the joint funds of the defendant aforesaid, and said Angelo, or with the rents, issues, profits, or proceeds of any property owned by said defendant jointly for himself and in trust for said Angelo, or if such partition cannot be made by metes and bounds, that your honors

will order a sale thereof for division between said defendant and said heirs, saving and protecting in said decree the dower interest of said Angela F. Philippi in said lands; and that said defendant, Antonio Philippi, shall also pay to your orator and the other heirs of said Angelo, deceased, their just and rightful shares of all the rents, issues, and profits of any and all real estate held by him, in whole or in part, in trust for said Angelo, which have accrued and been received by him since the death of the said Angelo; and that the said defendant, Antonio Philippi, shall also account for and pay over to your orator and the other heirs hereinbefore described, or pay over to said Angela F. Philippi, as administratrix of said deceased, all the rents, issues, profits, and proceeds of all property, both real and personal, which has been received by him prior to the death of said Angelo, and which was derived from property held in trust by him as aforesaid, and which remains in his hands uninvested; and that he shall deliver up all, or said Angelo's share in all or any personal property held by him which has been purchased with funds arising from property held in trust, wholly or in part, for said Angelo, or that he shall pay your orator and the other aforesaid heirs or said administratrix the value thereof, and that your honors will by such decree ascertain and fix the values of all such rents, issues, profits, proceeds, and personal property.

15 And your orator prays that he may have such other or further relief in the premises as the nature of the circumstances of this case may require, and to this honorable court shall seem meet.

And may it please your honors to grant unto your orator a writ of subpœna of the United States of America, issueing out of and under the seal of this honorable court, directed to the said Antonio Philippi, Angela F. Philippi (otherwise written Filippi), individually and as administratrix of Angelo M. Philippi, deceased; Eugene Philippi, Antonio Philippi, adults, and Louis Philippi, Angelo Philippi, and Louisa Philippi, minors, under the age of fourteen years, resideing with their mother, the said Angela F. Philippi, defendants, commanding them, and each of them, on a day certain therein to be named, and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand, to perform, and abide such further order and direction and decree as may be made against them, or either of them.

And your orator as in duty bound will ever pray, &c.

FRED'K G. BROMBERG,
Solicitor for James S. Philippi.

UNITED STATES OF AMERICA, } ss:
District of Louisiana, }

James Saint Philippi, being duly sworn, deposeth and saith: That he is the complainant in the foregoing bill named, and has read the same, and knows the contents thereof.

That the said bill is true of his own knowledge, except as to

those matters which are therein stated to be on his infor-
16 mation and belief, and as to those he believes it to be true.

JAMES SAINT PHILIPPI.

Subscribed and sworn before me, Oct. 7th, 1879.

F. A. WOOLFLEY.
Clerk U. S. Circuit Court, District of Louisiana.

NOTE.—Each defendant is required to answer each of the paragraphs of the bill numbered one to fifteen, inclusive; but answer under oath is expressly waived as to the defendant, Antonio Philippe.

FRED'K G. BROMBERG,
Solicitor for Complainant, James S. Philippi.

Filed Oct. 20th, 1879. N. W. TRIMBLE, *Clerk.*

$50.00 deposited as security for costs.

N. W. TRIMBLE, *Clerk.*

17 EXHIBIT "A."

Filed Oct. 20th, 1879. N. W. TRIMBLE, *Clerk.*

1st. The one-third interest in the premises in the port of Mobile, on the southwest corner of Monroe and Franklin streets, conveyed to Antonio Philippi by M. A. Langenotti and Emeline, his wife, for the consideration of eight hundred dollars by a deed made February 20th, 1852, which is recorded in book of deeds No. 3, N. S., at page 417, in the office of the probate judge for Mobile county, to which reference is hereby made for more certain description.

2d. Also the premises in the said port of Mobile, situate on the east side of Water street, between Conti and Dauphin streets, conveyed to Antonio Philippi by William Le Baron and Eliza, his wife, for the consideration of thirty-four hundred and sixty dollars, by a deed made on the 20th April, 1851, and recorded in book of deeds No. 4, N. S., at page 139, in the office of the aforesaid probate judge, to which reference is hereby made for more certain description.

3d. Also the premises in the port of Mobile, situate on Palmetto, formerly Maine street, conveyed to Antonio Philippi for the consideration of thirty-five hundred dollars by Edward C. Johnson and Delia, his wife, by a deed made on the 27th May, 1852, recorded in the office of the aforesaid probate judge in book of deeds No. 5, N. S., at pages 88 & 89, which is hereby referred to for more certain description.

4th. Also the premises in the port of Mobile on the northwest corner of St. Emanuel and Conti streets, conveyed to Antonio Philippi for the consideration of two hundred and thirty dollars by James W. Lang, sheriff, by a deed made on the 7th November, 1853, which is recorded in the office of the aforesaid probate judge in book of deeds No. 6, N. S., at page 363, which is hereby referred to for more certainty of description.

18 5th. Also the premises in the port of Mobile, situate on the west side of Water street, between Conti and Dauphin streets,

conveyed to Antonio Philippe for the consideration of twelve thousand dollars by Caleb Price, Jr., and Lavinia, his wife, by a deed made on the 8th of May, 1853, which is recorded in the office of the aforesaid probate judge in book of deeds No. 7, N. S., at page 88, to which reference is hereby made for greater certainty of description.

6th. Also the premises in the port of Mobile, situate on the north side of Dauphin street, between Hamilton and Lawrence streets, conveyed to Antonio Philippi for the consideration of fifteen hundred dollars by David Stodder and James Kelly, executor of Michael O'Connor, deceased, by a deed made on the 14th May, 1855, which is recorded in the office of the aforesaid judge of probate in book of deeds No. 9, N. S., page 532, which is hereby referred to for greater certainty of description.

7th. Also the premises in the port of Mobile on the north side of Dauphin street, between Joachim and Jackson streets, conveyed to A. Philippe for the consideration of sixteen hundred dollars by C. E. Bolles, by a deed made on the 17th January, 1856, which is recorded in book of deeds No. 9, N. S., page 534, in the office of the aforesaid probate judge, to which reference is hereby made for greater certainty of description.

8th. Also the premises in the port of Mobile, situate on Conception street, conveyed to Antonio Philippi for the consideration of two thousand dollars by Archibald W. Gordon, by a deed made on the 13th February, 1856, which is recorded in the office of the aforesaid probate judge, in book of deeds No. 9, N. S., at page 701, to which reference is hereby made for greater certainty of description.

19 9th. Also the premises in the port of Mobile, situate on Conception street, conveyed to Antonio Philipi by Archibald W. Gordon for the consideration of five thousand dollars, by a deed made on the 5th March, 1856, which is recorded in the office of the aforesaid judge of probate in book of deeds No. 9, at page 702, which is hereby referred to for greater certainty of description.

10th. Also the premises in the port of Mobile, situate on the northeast corner of Monroe and Claiborne streets, conveyed to Antonio Phillipe by William De Forrest Holly and Anne P., his wife, for the consideration of seventy-five hundred dollars, by a deed made on the 2d November, 1859, which is recorded in the office of the aforesaid probate judge in book of deeds No. 14, N. S., at page 249, whereto reference is hereby made for greater certainty of description.

11th. Also the premises in the port of Mobile on the northeast corner of Dauphin and Royal streets, conveyed to Antonio Philipe, for the consideration of twenty thousand dollars by Henry G. Humphries, executor of the will of Joseph Krebs, deceased, by a deed made on the 29th March, 1861, which is recorded in the office of the aforesaid probate judge in book of deeds No. 16, N. S. at page 104, whereto reference is hereby made for greater certainty of description.

12th. Also the premises in the port of Mobile, situate on the east side of Commerce street, between Conti and Dauphin streets, con-

veyed to A. Phillipe by Duke W. Goodman and Caroline, his wife, for the consideration of twenty-one thousand dollars, by a deed made on the 10th April, 1862, which is recorded in the office of the aforesaid probate judge in book of deeds No. 16, N. S., at page 607,
20 to which reference is hereby made for greater certainty of description.

13th. Also the premises in the port of Mobile, on the southeast corner of Government and Conception streets, conveyed to A. Phillipe by Stephen M. Potts and Susan T., his wife, for the consideration of nine thousand dollars, by a deed made on the 17th February, 1866, which is recorded in the office of the aforesaid judge of probate in book of deeds No. 20, N. S., at page 127, to which reference is hereby made for greater certainty of description.

14th. Also the premises in the port of Mobile, on Conception street, adjoining the premises described immediately preceding, conveyed to A. Philipe by William Miller, administrator of the estate of William J. Cole, deceased, for the consideration of twenty-one hundred dollars, by deed made on the 18th June, 1875, which is recorded in the office of the aforesaid probate judge in book of deeds No. 34, N. S., at page 384, to which reference is hereby made for greater certainty of description.

15th. Also the undivided half interest in the premises situate in the port of Mobile, on the north side of Government street, 55½ feet west of Commerce street, conveyed to A. Philipe by Balthazar Tardy and Mary, his wife, for the consideration of twenty-five hundred dollars, by deed made on the 26th March, 1868, which is recorded in the office of the aforesaid probate judge in book of deeds No. 24, N. S., at page 59, to which reference is hereby made for greater certainty of description.

16th. Also the undivided half interest in lands situate in the port of Mobile, on the south side of Dauphin Way, next east of lands formerly belonging to Frederick Stewart, then known as the Frederick Wolffe place, conveyed to A. Philipe for the considera-
21 tion of five thousand dollars by the master in chancery, by deed made on the 4th May, 1868, which is recorded in the office of the aforesaid probate judge in book of deeds No. 24, N. S., at page 154, to which reference is hereby made for greater certainty of description. Also the other undivided half of the same premises conveyed to Antonio Philipi for the consideration of three thousand dollars by Joseph Aaron and Emma, his wife, by deed made on the 1st September, 1871, which is recorded in the said office in book of deeds No. 30, N. S., at page 578, to which reference is also made for greater certainty of description.

17th. Also the premises in the port of Mobile, on the south side of Dauphin Way, to the east of and adjoining the premises immediately preceding described, and included in the preceding described conveyance by Joseph Aaron and wife to A. Philipe, made September 1st, 1871.

18th. Also the premises in the port of Mobile, on the south side of St. Francis street, between Water and Commerce streets, 90 feet west of the southwest corner of St. Francis and Commerce streets,

conveyed to A. Phillipe by the master in chancery for the consideration of twenty-one hundred dollars, by deed made on the 4th January, 1869, which is recorded in the office of the aforesaid probate judge in book of deeds No. 25, N. S., at page 140, to which reference is hereby made for greater certainty of description.

19th. Also the premises in the port of Mobile, on the north side of Dauphin street, between Royal and Water streets, conveyed to Antonio Phillipe by Thomas B. Miller and Emma, his wife, for the consideration of fifteen thousand dollars, by conveyance made
22 on the 20th April, 1871, which is recorded in the aforesaid probate judge's office in book of deeds No. 28, N. S., at page 579, to which reference is hereby made for greater certainty of description.

20th. Also the premises in the port of Mobile, on the south side of Government street, between Royal and Water streets, one hundred and eighty-two feet east of the southeast corner of Royal and Government streets, conveyed to defendant, at a time, and for a consideration, and by parties unknown to your orator, and more fully described in a deed made on the 20th October, 1858, which is recorded in the office of the said probate judge, in book of deeds No. 12, N. S., at page 465, in which the said defendant as Antonio Phillipi and Matilda A., his wife, conveyed the same to John Roberts for the consideration of four thousand dollars, to which record reference is hereby made for greater certainty of description.

21st. Also the premises in the port of Mobile, on the southwest corner of St. Emanuel and Monroe streets, conveyed to said defendant, at a time, and by parties, and for a consideration unknown to your orator, more fully described in a deed made on the 1st September, 1854, in which said defendant, as A. Philipe and Matilda, his wife, conveyed the same premises to Charles P. Antomarchi for the consideration of nine thousand dollars, which is recorded in the office of said probate judge in book of deeds No. 8, N. S., at page 412, to which reference is hereby made for greater certainty of description.

22d. Also the premises in the port of Mobile, on the east side of Clairborne street, between St. Louis and St. Anthony streets, conveyed to Antonio Phillipe by Adelaide de V. Chaudron for
23 the consideration of forty-five hundred dollars by deed made on the 1st February, 1866, which is recorded in the office of the probate judge, in book of deeds No. 20, N. S., at page 108, to which reference is hereby made for greater certainty of description.

23d. And also other lands to your orator unknown, concerning which he asks leave to introduce proof hereafter.

Filed Oct. 20th, 1879. N. W. TRIMBLE, *Clerk.*

Subpœna.

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Fifth Judicial Circuit and the District of Alabama, at Mobile.

JAMES S. PHILLIPPI, Complainant,
vs.
ANTONIO PHILIPPE *et als.*, Defendant-. } In Equity.

The President of the United States of America to Antonio Phillippe, Angela F. Philippi, individually and as administratrix of Angelo M. Philippi, deceased, Antonio Philippi, who are citizens of the district aforesaid and of the State of Alabama, Greeting:

You, and each of you, are hereby commanded and strictly enjoined that, laying all other matters aside, and notwithstanding any
24 other excuse, you and each of you personally be and appear before the judge of the circuit court of the United States for the fifth judicial circuit and southern district of Alabama, at Mobile, at the clerk's office of the said court in the city of Mobile, at rules to be had on the first Monday of December (being the 1st of said month) next, to plead to, answer, or demur to a bill of complaint exhibited against you in the said court by James S. Philippi, who is a citizen of the State of Louisiana, and to do further and receive what the said court shall have considered in that behalf, and this you are not to omit; and have there then this writ.

To the marshal of the United States for said district to execute.

Witness Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Mobile, this the 25th day of October, in the year of our Lord one thousand eight hundred and seventy-nine, and the Independence of the United States of America the 104th year.

Attest: N. W. TRIMBLE, *Clerk, &c.*

NOTE.—The defendant is required, and hereby notified, to enter appearance in the above-entitled cause in the clerk's office of said court, in the custom-house building in the city of Mobile, on or before the rule day next ensuing, to wit, the first Monday of December, anno Domini 1879, or the bill may be taken *pro confesso* against them.

N. W. TRIMBLE, *Clerk, &c.*

FREDERICK G. BROMBERG,
Complainant's Solicitor.

Issued this 25th day of October, A. D. 1879.

N. W. TRIMBLE, *Clerk.*

Received in office this 28th day October, A. D. 1879, Geo. Turner, U. S. marshal, executed by serving a copy of the within subpœna on Antonio Philippe, Antonio Philippi, & on Angela T. Philippi,
25 individually and adm'x of Angela M. Philippi, this 29th day of October, A. D. 1879.

GEORGE TURNER, *U. S. Marshall.*
By F. Y. ANDERSON, *Deputy.*

Subpœna.

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Fifth Judicial Circuit and the Southern District of Alabama, at Mobile.

JAMES S. PHILIPPI, Complainant,
vs.
ANTONIO PHILIPPE *et als.*, Defendant. } In Equity.

The President of the United States of America to Eugene Philippi, who is a citizen of the district aforesaid, and of the State of Alabama, Greeting:

You, and each of you, are hereby commanded and strictly enjoined that, laying all matters aside, and notwithstanding any other excuse, you, and each of you, personally be and appear before the judge of the circuit court of the United States for the fifth judicial district and southern district of Alabama, at Mobile, at the clerk's office of the said court, in the city of Mobile, at rules to be had on the first Monday of December (being the 1st day of said month) next, to plead to, answer, or demur to a bill of complaint, exhibited against you and others in the said court by James S. Philippi,
26 who is a citizen of the State of Louisiana, and to do further and receive what the said court shall have considered in that behalf, and this you are not to omit. And have there then this writ.

To the marshall of the United States for said district to execute.

Witness Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Mobile, this the 25th, Monday of October, in the year of our Lord one thousand eight hundred and seventy-nine, and the Independence of the United States of America the 104th year.

Attest: N. W. TRIMBLE, *Clerk, &c.*

NOTE.—The defendant is required and hereby notified to enter appearance in the above cause in the clerk's office of said court, in the custom-house building, in the city of Mobile, on or before the rule day next ensuing, to wit, the first Monday of December, anno Domini 1879, or the bill may be taken *pro confesso* against them.

N. W. TRIMBLE, *Clerk, &c.*

FREDERICK G. BROMBERG,
Complainant's Solicitor.

Issued this 25th day of October, A. D. 187–.

N. W. TRIMBLE, *Clerk.*

Received in office this 1st day of November, A. D. 187–.

GEO. TURNER,
U. S. Marshall.

Executed by serving copy of the within subpœna on Eugene Philippi at Montgomery, Ala., Nov'b'r 10, 1879, this — day of ——, A. D. 187–.

GEO. TURNER, *U. S. Marshall.*
By F. JOST, *Deputy.*

27 *Demurrer.*

In the Circuit Court of the United States at Mobile, in the Southern District of Alabama.

The demurrer of Antonio Phillippe, defendant, to the bill of complaint filed in this honorable court by James Saint Phillippe against him, the said Antonio Phillipe, and against the widow and heirs of Angelo M. Phillippe, deceased, and also against the administratrix of said Angelo M. Phillippe, dec'd.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur in law to the said bill, and for cause of demurrer shews:

1. That the said complainant hath not by his bill aforesaid made such a case as entitles him in a court of equity to any discovery or relief from or against this defendant in a court of equity from or against this defendant touching the matters or things contained in said bill, or any of such matters.

2. That by said bill the said complainant claims relief, founded on two certain letters asserted to have been written by the defendant, and undertakes to inform the court of what the pleader understands to be the purport of said letters, in such form that the allegations of the bill in respect thereto are but the conclusions of the pleader of their force and legal effect, and does not set forth or disclose the tenor of said letters so that the court may judge of what is the true purport and construction, and also the legal effect thereof; thus setting forth matter of evidence only instead of averment of fact, and putting in issue a matter of evidence only, that is to say, that the defendant did acknowledge certain things which makes an
28 immaterial issue, instead of averring the facts themselves inferred from acknowledgements, so that the issue may arise on the facts and not on acknowledgements merely.

3. That the said bill shews claims made of stale demands said to have occurred more than twenty years before the filing of this bill, being to investigate transactions so far back which this court by its rules will not entertain at this late day, after the death of party and witnesses, loss of evidence and memory, whereby no certainty can be had of the truth of the claims set forth, and which the law considers as impossible to be investigated after so long delay and parties sleeping on their rights.

4. Because it is shewn by the allegation of the said bill that the said Angelo came back to Mobile in 1856, since which time it does not appear that there were any partnership business carried on be-

tween him and this defendant, no accounts rendered, and no settlement made, and no transactions whatever between the parties of any kind up to the present time, wherefore it is shewn to the court that no remedy in chancery can be obtained at so late a day on such transactions as claimed.

5. That the bill claims that lands which were conveyed to the defendant, and for which he took titles to the same as his own property, were purchased in part with moneys claimed by the complainant to belong to Angelo, his father. The said lands so purchased in the years from 1845 to 1848, inclusive, more than thirty years ago, the defendant having been in the quiet possession of the same and of the rents and profits since that time; that such being the case, no such claim as made can be entertained by the rules of this court by said complainant.

29 6. That the said bill shews that in 1845 the said Angelo went to France and left his business affairs, property, and money in the keeping of Antonio, his brother, to manage for him; but he does not show what business, property, or money he so left; that in 1847 & '8, by letters, the def't acknowledged having $10,000 in hand, and that he acknowledged he had put $4,000 to the credit of said Angelo; that he had closed the partnership acc't on the 1st of Nov., 1848, as an account settled for that year; but no account nor acknowledgement appears since 1848, and no claim seems to have been made after that date, wherefore the conclusive presumption arises, nothing appearing to the contrary, that all such demands have been fully satisfied and extinguished.

7. That by the said bill of complaint it appears, and is distinctly set forth, that the said complainant's father, Angelo, died in 1874; that the claim now made existed in 1874, under whose right he claimed as heir; that the rights now set up were fully known to said Angelo; that they arose in the year 1845, and existed since the year 1848, and that the said Angelo declared that he never would institute any proceedings for the recovery thereof, nor for any account against the said defendant, and did not up to the time of his decease. Wherefore this defendant says the said complainant cannot now set up any right in his said ancestor, and is barred and estopped by the conduct of his said father and his will in this behalf, and that he inherited no right which his father refused to claim or assert.

8. That it is not shewn by said bill than any copartnership business was transacted between said Angelo and this defendant, in the business of boarding-house or saloon keeping, or in any other kind of business whatever within twenty years before the filing of this bill, nor within twenty years before the decease of said

30 Angelo in 1847, nor that any personal copartnership services were rendered by said Angelo in connection with the defendant, nor since his departure for France in 1845, nor any capital furnished by said Angelo since his return to Mobile, in 1856, nor for many years before, therefore no settlement of any copartnership account can be now demanded.

9. That from the shewing made by said bill, no case of trust is shewn by the allegations of the same; that no direct trust appears

to have been created when the said Angelo left Mobile for Europe, and when, as is alleged, he left his property, business, and money in the hands of his said brother, this defendant, no specification whatever being shewn of what the business nor property was, nor amount of money, nor the value thereof, nor the terms of such trust, and no writing made at that time being pretended to have been made evidencing the same, and no trust by implication appearing from the facts stated and properly pleaded, and nothing being shewn to take the transactions as set forth out of the class of agencies and copartnership transactions, money indebtedness, and accounts, wherefore it does not appear that the law of trusts is involved in this controversy, but that all the said demands are barred by the law of limitations after the period of six years accrued from the time when any right of action accrued.

10. That the bill prays that moneys be paid to the co-defendant, Angela Francheschi, and to the other co-defendants in this cause, and that the defendant do account to them in this court, when they are all shewn to be citizens of Alabama, between whom and this defendant this court has no jurisdiction to entertain complaints by them against this defendant, nor to make any decree in their favor,
and particularly when they have made no such claim, nor
31 any claim on their part

11. Because it is shown by said bill that no account has ever been rendered as to any property asserted to have been put in the hands of said defendant by said decedent, no specification of which is shown, but said to have been left in his hands in the year 1845, and no payment on the same made at any time, and no account thereof demanded at any time, and when it is asserted, in so many words, "that the said defendant has ever since continued in the absolute possession of all of said trust and partnership property (so-called by the compl't), and has never rendered any statement of account for final settlement of said trust (so-called) and partnership affairs, and has always enjoyed, and still continues to enjoy, the use of all the estate, property, money, and other assets of said trust and partnership affairs, and all the rents, incomes, and profits therefrom arising." (See 10th paragraph of the bill.) Because, he says, that it is too late, after the expiration of thirty-four years, to assert in this court any such pretended claim.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, that the said complainant, this defendant, demurs to the same, and to all the matters and things therein contained, and prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, and he respectfully prays to be hence dismissed, with his reasonable costs in this behalf sustained.

STEWART & PILLANS,
Sol'rs for D'f't, A. Phillippe.

We, George N. Stewart and Harry Pillans, solicitors for the defendant, Antonio Phillipe, defendant in the above cause, do

32 hereby certify that the foregoing demurrer to the complainant's bill is well founded in point of law, in their opinion.

Mobile, Nov'r 12, 1879.

GEORGE N. STEWART,
HERRY PILLANS,
Counsel for D'f't.

Antonio Phillipe, defendant in the above and foregoing cause, being duly sworn, deposes and says: That the foregoing demurrer by him filed to the complaint of James Saint Philipe, and against him, this defendant, and others, in this court, is not interposed for delay.

A. PHILIPE.

Sworn & subscribed before me on this 13th day of Nov'r, 1879.

HENRY S. SKAATS,
U. S. Commissioner.

Filed Nov. 13th, 1879.

N. W. TRIMBLE, *Clerk.*

33 *Order Sustaining Demurrer & Leave to Amend Bill.*

J. S. PHILIPE
vs.
A. PHILIPE. } In Chancery.

This cause coming on to be heard on the demurrer of the defendant, Antonio Philipe, to the bill of complaint, and the same being fully argued by counsel for complainant and for said defendant, A. Philipe, and the same being duly considered, it appears to the court that the said demurrer is well taken, and the same is, therefore, sustained; and it is further ordered that complainant have leave to amend his bill of complaint.

(Signed) W. B. WOODS, *Judge.*

Jan'y 17, 1880.

Filed Jan'y 17, 1880.

N. W. TRIMBLE, *Clerk.*

Motion to set aside Order allowing Amendment.

Circuit Court United States for the Southern District of Alabama.
December Term, 1879.

J. S. PHILLIPE
vs.
ANTONIO PHILIPE *et als.* } In Chancery.

Motion to set aside order allowing amendment of bill by complaint.

The defendant, Antonio Philipe, moves the court to set aside the order allowing the bill of complaint to be amended, and that motion to allow amendment be refused, for the reasons following:

It is respectfully suggested that the motion to the court was made

at a hurried moment, without any notice to the defendants for leave to amend.

34 That by rule 35 of equity rules, page 286 of Desty's Rules, page 286 of said rules, where a demurrer is allowed to the bill, the defendant shall be entitled to his costs. But the court may allow amendments on such terms as the court may deem reasonable.

An application to amend is not grantable, of course, but depends on the discretion of the court.

The question is, therefore, should the proposed amendment be allowed in the discretion of the court.

We claim that no amendment can be allowed which would present the case on the law of the bill to be the same on which the points have been decided by the court. There must new issues appear in the proposed amendment which will present new propositions of law untried for the decision of the court, else the amendment is useless.

It must, therefore, be made known to the court what the proposed amendment is before it can be decided by the court whether or not the amendment should be allowed. The practice is when an amendment is proposed the party proposing the amendment must produce it to the court and to the counsel, so that it can be seen and considered as to whether it be proper to be allowed or not.

Under a general order, without time limited for its filing, or without knowing whether it be futile or not, the cause is to stand continued without propriety.

In the present case it is made known to the court that this same cause of complaint was made in the chancery court of Mobile county involving the same issues, in which this same complainant was a party and against the same defendant Philipe, was heard and decided, and the bill was dismissed. That an appeal was taken to the supreme court of the State of Alabama, and the decree of the State court of chancery was affirmed on the law stated in the bill.

35 The costs of the chancery cause in the previous bill in the State court have not been paid, as is shown by the certificate of the register in chancery in Mobile.

No security for costs has been given in this court other than a deposit of $50.00, which we suggest is not sufficient for this and future proceedings, and the complainant has no property, and is a man of no responsibility.

The defendant, it is true, can answer the bill, but being advanced in years, his counsel has advised the demurrer rather than to indulge the complainant in what no doubt is much desired—a long litigation, with perhaps appeal to a higher court, which would not be terminated in his lifetime.

The defendant refers to his affidavit, herewith submitted, to show that there are no merits in the cause, and that it is merely a vexatious suit.

The defendant further shows that by the law as decided in Alabama no bill lies by an heir to assert a claim against one who may be charged to be a debtor to the deceased, his ancestor particularly,

when no collusion is shown between the debtor to the estate and the administrator, settled by the supreme court of Alabama.

(Signed) STEWART & PILLANS,
Sol's for Def't Antonio Phillipe.

January 20th, 1880.

36 *Copy of Record of Chancery Court of Mobile County.*

A transcript of certain proceedings had in a cause heretofore pending in the honorable court of chancery, held in the city of Mobile, for the first district of the southern chancery division of the State of Alabama, wherein Bernard Raussett is complainant and the Andes Insurance Company and Richard Inge Smith, receiver, &c., *et als.*, are defendants.

Claim of A. Philipe against A. M. Philipe.

BERNARD ROUSSETT
vs.
ANDES INSURANCE CO., R. INGE SMITH, *et al.* } No. 3302. In Chancery.

And now comes A. Philipe and propounds his claim against A. M. Philipe, as shown by the paper hereunto attached, and further states that on or about the date which the paper hereto attached bears date he loaned the said A. M. Philipe the sum of money therein stated, to wit, the sum of eight hundred dollars, and that he loaned to the said A. M. Philipe the said sum of $800 *dollars* on the faith and credit of the said policy of insurance,
37 then in the hands of Messrs. Gibbons & Price for collection, and after the money was so loaned to the said A. M. Philipe, as aforesaid, on the faith and credit of the said policy aforesaid, he presented the said paper to the said Gibbons and Price, who acknowledged the presentation of the same; and this claimant now avers that he claims that the said sum of money be paid to him, to wit, the sum of $800, out of the proceeds of said policy, as an appropriation of that much of the said policy at the date aforesaid then unappropriated, and to the exclusion of any subsequent lien which may have attached to the said fund by attachment, garnishment, judgment, or other proceedings, and this claimant will ever pray.

A. PHILIPE.

Subscribed and sworn to before me this, the 12th day of August, A. D. 1873.

JAMES GILLETTE, *Register.*

38 $800. MOBILE, *June 26th*, 1872.

Due Antonio Philipe, the sum of eight hundred ($800.00) dollars, borrowed money, to be repaid out of the moneys to be recovered on the policy of insurance of the Andes Insurance Co., which I hold, when collected, and now in the hands of Messrs. Gibbons & Price for collection.

And they are hereby instructed to pay the same on this due bill when the insurance money is collected.

A. M. PHILLIPPE.

Presented to us—
GIBBONS & PRICE.

Filing.

Filed August 12th, 1873.

JAMES GILLETTE, *Register.*

Affidavit Pertaining to Claim of A. M. Philippe.

BERNARD ROUSSETT
vs.
ANDES INSURANCE CO., R. INGE SMITH, Receiver *et al.* } In Chancery.

And now comes A. M. Philippe, and intervenes for his interest coming to him in the above-entitled cause from his policy of
39 insurance in this cause filed and shown to the court, he is entirely destitute of property, except the money and proceeds coming to him from his said policy of insurance.

That it constitutes all the property he has in the world, except a few articles of household furniture and wearing apparel for his family, which he is advised by law is exempt form execution and levy, and this affiant now shows to the court that he is advised by counsel that he is entitled to one thousand dollars as exempt from levy, attachment, and garnishment, and he claims this amount shall be left to him unaffected by the creditors or any of their proceedings in this case.

This claimant therefore prays the court to adjudge to him out of the proceeds of his said policy in this cause filed, over and above what may be adjudged to creditors under their attaehments, judgments, garnishments, or other proceedings, the sum of one thousand dollars, which he is advised the law allows him to retain, and he is in duty bound will ever pray.

40 A. M. PHILIPPE.

Sworn to and subscribed, this the 12th day of August, A. D. 1873.
JAMES GILLETTE, *Register.*

Filing.

Filed August 12th, 1873.

JAMES GILLETTE.

Award.

B. RAUSETT
vs.
THE ANDES INSURANCE COMPANY *et al.* } In Chancery. To Wm. G. Jones, as arbitrator. Award.

I, William G. Jones, as arbitrator, appointed by A. M. Philippe and others, claiming as his creditors, by a written submission, dated

July —, 1873, hereto attached and herewith returned, do report, award, and certify thereon as follows:

Friday, the 7th day of November, 1873, was appointed as the time for hearing the matters submitted to me, at my office, in the city of Mobile, of which appointment the parties, by their attorneys, were duly notified, and at the time and place appointed, L. Gibbons for himself, and as attorney for A. M. Philippe and A. Philippe; Henry St. Paul, Esq., attorney for W. H. Kelly & Co., Elsworth, Russell & Co., and P. Ausgustini & Co.; Thomas H. Herndon, Esq., attorney for Kate Anderson; John T. Taylor, Esq., attorney for P. A. Pepper & Co.; G. Y. Overall, Esq., attorney for Marshall & Conolly,
41 James E. Knapp, and A. A. Vass & Co., and Messrs. Austill and Pillans, attorneys for L. Brewer & Co., appeared before me. The proceedings on the submission were then commenced, and were regularly continued from time to time until concluded. The claim of P. Augustini & Co. was withdrawn by H. St. Paul, their attorney, and no evidence was offered in support of that claim. The petitions of the several claimants filed in this cause were offered and received in evidence, no objection being made thereto. Affidavits in support of the alleged waiver by A. M. Philippe of his right to claim an exemption of $1,000 out of the fund in controversy, so far as relates to the claim of P. H. Pepper & Co., W. H. Kelly & Co., and Elsworth, Russell & Co. were offered in evidence, and objected to by L. Gibbons, as irrelevsnt and inadmissible, but the objection was overruled, and the affidavits admitted, and are herewith returned. It was stated and agreed that the sum of ten dollars were paid by L. Gibbons as exchange or expense in getting the money in question into his hands in Mobile, and that this (in addition to the $450 attorneys' fee) should be deducted from the $3,000 received by him, leaving in his hands a balance of two thousand five-hundred and forty dollars, to be distributed, ($2,540). The amount of A. A. Vass & Co, (which is herewith returned) was offered and received by consent, to have the same effect as if it had been presented by petition in this cause. It was further agreed that a reasonable sum should be paid out of the fund to the arbitrator for his services as arbitrator, and the sum of one hundred dollars is claimed therefor, and, no objection being made thereto, is allowed.

2. The evidence in the case, and the arguments of counsel thereon, being considered, I do find, determine, and award thereon as follows, to wit:

42 1. That the claim of A. M. Philippe of one thousand dollars, as exempt from legal proceedings for the payment of his debts, is a valid claim under the laws of this State, and it is allowed in full, but without interest, and subject to a deduction of his rateable share of the costs of this arbitration.

2. That none of the claimants, creditors of said A. M. Philippe, have acquired any valid lien on the fund in question, or any equitable right of priority of payment out of said fund, either by attachment, garnishment, judgment, assignment, or otherwise.

3. That the residue of said fund left, after paying the cost of this arbitration and the claim of A. M. Philippe, shall be apportioned

among and paid to the creditors *pro rata*, in proportion to the amounts due to them, severally and respective-, for principal and interest to this date (15 November, 1873), and the amounts so due to them and the dividends thereon, respectively, I find and report to be as follows:

Statement.

Amount received by L. Gibbons		$3,000 00
Deduct att'y's fee, $450 & exchange $10.00		460 00
		$2,540 00
Deduct am't allowed arbitrator (costs)		100 00
		$2,440 00
Deduct am't claim of A. M. Philippe	$1,000	
Less his proportion of costs	40 98	
		959 02
Balance for distribution among creditors		$1,480 98

	Creditors.	Am'ts due princ., int.	Dividends 37.4 per ct.
1.	L. Gibbons	$93 13	$34 49
2.	A. Philipe	888 71	329 27
3.	W. H. Kelly & Co.	414 29	151 96
4.	Elsworth, Russell & Co.	116 20	43 04
5.	Kate Anderson	971 44	359 80
6.	P. H. Pepper & Co.	397 59	147 25
7.	Marshall & Conolly	165 54	61 30
8.	James E. Knapp	502 37	186 07
9.	L. Brewer & Co.	345 98	113 35
10.	A. A. Voss & Co.	147 04	54 45
		$3,998 29	$1,480 98

And as I do determine and award that the said L. Gibbons, out of the fund in his hands, shall pay, first, the arbitrator's fee, one hundred dollars; second, he shall pay to A. M. Philippe, on his claim of exemption, nine hundred and fifty-nine $\frac{2}{100}$ dollars ($959.02).

And he shall pay to the several creditors the following pro rata sums as dividends, viz:

1. He shall retain as his own dividend thirty-four $\frac{49}{100}$ dollars ($34.49).

2. He shall pay to A. Philipe three hundred and twenty-nine $\frac{27}{100}$ dollars ($329.27).

3. He shall pay to W. H. Kelly & Co. one hundred and fifty-one $\frac{96}{100}$ dollars ($151.96).

4. He shall pay to Elsworth, Russell & Co. forty-three $\frac{4}{100}$ dollars ($43.04).

5. He shall pay to Kate Anderson three hundred and fifty-nine $\frac{80}{100}$ dollars ($359.80).

6. He shall pay to P. H. Pepper & Co. one hundred and forty-seven $\frac{25}{100}$ dollars ($147.25).

7. He shall pay to Marshall & Conally sixty-one $\frac{30}{100}$ dollars ($61.30).

8. He shall pay to James E. Knapp one hundred and eighty-six $\frac{7}{100}$ dollars ($186.07).

44 9. He shall pay to L. Brewer & Co. one hundred and thirteen $\frac{35}{100}$ dollars ($113.35).

10. He shall pay to A. A. Voss & Co. fifty-four $\frac{45}{100}$ dollars ($54.45).

For which several sums the said creditors or their attorneys shall severally give their receipts to said D. Gibbons, and in pursuance of said submission I do now return and file this my award in the said cause, in the office of the chancery court at Mobile, this 18th November, 1873.

WM. G. JONES, *Arbitrator.*

Filing: Filed November 18th, 1873.

JAMES GILLETTE, *Register.*

THE STATE OF ALABAMA, *First District, Southern Division:*

In Chancery at Mobile.

I, Joseph Hodgson, register in chancery for the first district of the southern chancery division of the State of Alabama, do hereby certify that the foregoing eight pages and ten lines of written matter contain a true and complete copy of certain proceedings had in a cause heretofore pending in the court of chancery for the district and division aforesaid, wherein Bernard Rousett is complainant and the Andes Insurance Company and Richard Inge Smith, receiver, &c., *et als.*, are defendants, as the same remains of record in my office.

45 In testimony whereof, I have hereunto set my hand and affixed the seal of said court of chancery, this 27th day of January, A. D. 1880.

JOSEPH HODGSON, *Register.*

Filed January 30th, 1880. N. W. TRIMBLE, *Clerk.*

46 *Affidavit of A. Philipe.*

Circuit Court of the United States, Mobile.

J. S. PHILLIPE
vs.
ANTONIO PHILLIPE. } In Equity.

Antonio Phillipe, defendant in this cause, being duly sworn, deposes and says:

That it is wholly untrue that he is in any manner indebted to the heirs of Angelo M. Phillipe as is charged in the complainant's bill; that on the contrary, when he died, said Angelo was indebted to him.

He says it is not true that when he, this affiant, came to Mobile that he was without means, and that he was in any manner dependent on his brother; but that he brought considerable means with him.

That soon after his arrival he purchased a female slave for the sum of six hundred and fifty dollars, which he paid, as is shown by the bill of sale herewith exhibited, with means he had brought with him.

He says that it is not true, as charged in said bill, that the saloon at the northwest corner of Royal and Conti streets, which was the one last stated to have belonged to him, the said Angelo, and
47 which was kept by him and this affiant jointly, was, on the contrary, purchased by him, the said Antonio, individually, for his own account, and with his own means. That he individually purchased the said establishment and paid for the same with his own means, for the sum of $4,000, paid with his own money on the 27th of May, 1843, as is shown by the bill of sale made to him on said purchase, now herewith shown, and he afterwards purchased the buildings and paid ten thousand dollars for it.

This defendant further says that the said Angelo Phillippe returned from Europe to Mobile in the year 1853, as to which nothing is said in the complainant's bill. That while here then and before he left again a full settlement was had between him and this affiant of all matters of account; and that on said settlement a balance was found to be due from said Angelo to this affiant, which amounted to over nine hundred dollars, which never was paid.

This affiant further shews that in the year 1872 the said Angelo kept a drinking saloon in the city of Mobile, and that the
48 same was destroyed by fire. That he claimed the sum of $4,000 from the Andes Insurance on a fire policy, which became a subject of litigation, and being destitute he applied to this affiant for a loan of money to maintain his family until he could recover the insurance money; and that thereupon this affiant lent him eight hundred dollars, with the agreement that the amount was to be repaid to this affiant out of the insurance money when collected, which is shewn by the writing signed by said Angelo now on file in the Mobile chancery court.

That on a compromise said Angello was allowed the sum of three thousand dollars, but he owed debts to a larger amount, and his creditors set forth their claims upon said fund in the chancery court of Mobile.

That in said cause the matter was referred to the Hon. Wm. G. Jones as arbitrator, to settle the matter, and by publication the creditors were called in. That the said Angello made oath that—

"That he is entirely destitute of property, except the money and proceeds coming to him from the said policy of insurance.
49 That it constituted all the property he had in the world, except a few articles of household furniture and wearing apparel for his family, which he is advised by law is exempt from execution and levy. And this affiant now shews to the court that he is advised by counsel that he is entitled to one thousand dollars as

exempt from attachment, levy, or garnishment, and he claims this amount shall be left to him unaffected by the creditors or any of their proceedings in this cause," &c.

And this affiant shows that he presented his claim for the money so lent by him before the said arbitrator, and that by his award he allowed to said Angello Phillipe the sum of nine hundred and fifty-nine dollars and two cents out of said insurance money for his exemption, and he allowed to your affiant the sum of $329.27 as his *pro rata* share in the distributive share of said fund on his claim of $888.71 due him; and he allowed to the other creditors their *pro rata* shares in the same proportion, by his award made on the 18th Nov., 1873.

50 All which is fully shewn by the copies of record in said chancery court of Mobile herewith filed, on which award your affiant recovered said sum of $329.27 in part of his debt, and the remainder never was repaid.

The said Angelo died insolvent in 1874.

A. PHILIPE.

Sworn to be correct and true and subscribed by said Philipe before me, this 30th of Jan'y, 1880.

HENRY S. SKAATS,
U. S. Commissioner, So. Dist. Ala.

STEWART & PILLANS,
Sol'rs for Def't.

Filed January 30th, 1880.

N. W. TRIMBLE, *Clerk.*

51 *Order Denying Motion Made by Defendant, Antonio Philippe.*

In the Circuit Court of the United States, Southern District of Alabama, Fifth Judicial Circuit. In Equity.

JAMES S. PHILIPPI, Complainant,
vs.
ANTONIO PHILIPPE, Defendant.

The motion filed by the defendant, Antonio Phillippe, by his solicitors, Stewart and Pillans, on the 20th day of January, 1880, coming on to be heard on the 5th day of February, 1880, together with the affidavits filed in support of said motion by said defendant, whereby the court is moved to rescind the order heretofore made granting the complainant leave to amend his bill, it is ordered and adjudged that said motion of said defendant, Antonio Philippe, be, and the same is hereby, denied.

(Signed) JOHN BRUCE,
February 5, 1880. *Judge.*

52 *Amendments to Bill & Exhibits.*

In the Circuit Court of the United States for the Southern District of Alabama. In Equity. Amendments to Bill.

JAMES S. PHILIPPI, Complainant,
vs.
ANTONIO PHILIPPE *et als.*, Defendants.

To the honorable the judges of the circuit court of the United States, fifth judicial circuit, southern district of Alabama:

The complainant, James S. Philippi, by leave of the court first obtained, amends the bill of complaint in the above-entitled cause as follows, to wit:

1st. Amend the numbering of the paragraphs, commencing with the paragraph on page 7, numbered 8, by changing 8th, 9th, 10th, 11th. 12th, 13th, 14th, 15th, respectively, to 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th.

2d. Amend the 7th paragraph of the bill by adding thereto the words following, viz:

And orator avers that said property consisted of the stock, fixtures, and good will of the liquor saloons hereinbefore described, of a slave or slaves, whose exact number is to your orator unknown, and of said ten thousand dollars in money, referred to in the 8th paragraph of the bill.

3d. Amend the 8th paragraph of the bill by adding thereto the words following, viz:

Duly certified copies of the originals of said letters, dated May 5, 1847, and March 7, 1848, are hereunto annexed, marked Exhibits "B" and "C," respectively, and true translations of said let-
53 ters are herewith also annexed for the information of this court, marked, respectively, "Exhibits D" and "E." Orator prays that all of said exhibits, "B," "C," "D," and "E," may be taken as parts of the amended bill; the originals of said letters are herewith brought into court for the inspection thereof, and will be produced at the hearing of the bill.

4th. Amend the 12th paragraph on page 12 by inserting after the word "and," at the end of the 4th line from the foot of the page, the words following, viz:

"Orator charges that whereas the said defendant was not assessed at all for taxation on the books of the collector of State and county taxes for Mobile county prior to the year of the departure of said Angelo to Europe, viz., 1845, now he."

5th. Amend the bill by adding after the 16th paragraph four paragraphs and the interrogating clause, as follows, viz.:

"17th. Orator charges that said defendant, Antonio Philippe, expressly admitted the existence of the trusts hereinbefore described by a writing, signed by himself, and made on the 26th day of April, 1877, which writing was filed by said defendant in a cause then pending in the chancery court, in the first district, in the southern chancery division of the State of Alabama, wherein the defendants,

Angela Francheschi Philippi, individually and as administratrix of the estate of Angelo M. Philippi, deceased; your orator, James S. Philippi; the defendants Eugene Philippi, Antonio Philippi, adults; Louisa Philippi, Angelo Philippi, and Louis Philippi, minors, were complainants, and said Antonio Philippi was defendant. A true copy of said writing is hereto annexed, marked "Exhibit F," which is prayed to be taken as a part of the amended bill."

54 18th. Orator charges, "that of the allegations contained in said bill in the said chancery court for the State of Alabama, and a copy of the response to which by said defendant is shown in said Exhibit "F," those of the paragraph numbered two in said bill are substantially identical with the allegations made in paragraph 4 of this amended bill; those of paragraph 3 in said bill are substantially identical with those of paragraph 5 of this amended bill; those of paragraph 4 in said bill are substantially identical with those of paragraph 6 in this amended bill; those of paragraph 5 in said bill are as set forth in said "Exhibit F"; those of paragraphs 7 and 8 in said bill are substantially the same as those contained in the 11th paragraph of the amended bill; those of paragraph 10 of said bill are substantially identical with those of the 12th paragraph of this amended bill; those of paragraph 11 of said bill are substantially the same as those of paragraphs 9 and 10 of this amended bill; those of paragraph 12 of said bill are substantially the same with those of paragraph 13th of this amended bill; those of paragraph 15 of said bill are substantially identical with those of paragraph 15th of this amended bill; those of paragraph 16 of said bill are substantially identical with those of paragraph 16 of this amended bill.

19th. Orator further charges that said bill in said State chancery court contained the following direct interrogatories, among others, in words and figures as follows, viz:

5th. Was not the said business carried on by said Angelo M. Philippi with yourself extremely lucrative; and was not said Angelo Philippi reputed to be a man of considerable wealth in 1845, and did he not claim to be such, and did he not evidence the same by liberally assisting his relatives and countrymen with money and credit? Did not said Angelo, in or about the

55 year 1845, return to France on a visit, and did he not place all of his affairs and property of every kind and description in the city of Mobile in your keeping, to manage and invest for him the rentals, incomes, and profits of said property and business, and did you not expressly accept said trust, and have you not acknowledged and evidenced said acceptance by writings signed by yourself? Did you not have frequent correspondence by letter with said Angelo M. Philippi during his said absence in Europe, and did you not advise him in said correspondence of the state of his affairs in your hands; and whether you have any letters written by said Angelo and addressed to you from Europe, and of what dates and to what referring? 6th. Did you not, on or about the 5th May, 1847, have in trust ten thousand dollars belonging to said Angelo Philippi, your brother, and did you not agree to pay interest on the same?

Did you ever repay to said Angelo the said ten thousand dollars, or any portion thereof, and when and how and where? Did you ever pay said Angelo the stipulated interest upon said ten thousand dollars, or any part of said interest, and when and how and where? Did you ever pay any of said complainants said ten thousand dollars, or any part thereof, or said interest, or any part thereof, and when and how and where? And were you not associated with said Angelo M. Philippi in business in the year- 1847 and 1848, and was it not agreed between you that the net gains of said business should be divided equally between you and said Angelo, and were not the net gains of said partnership affairs for the year ending November 1st, 1847, eight thousand dollars, and did you not place four thousand of these eight thousand dollars to the credit of said Angelo Philippi, and did you pay said Angelo the said four thousand
56 dollars, or any part thereof, and where and how, or did you, invest said four thousand dollars, and how and when and subject to whose order? Did you not hold, in or about the year 1848, in trust for yourself and said Angelo Philippi, by titles taken absolutely to yourself, a number of slaves, and what number, of what sex, and of what age, and of what values, and did not the income derived from the annual hire of said slaves gfve, in the year 1847, the sum of four thousand five hundred dollars? Did you pay said Angelo M. Philippi his share, or any part of his share, in said four thousand five hundred dollars, and when and where and how; and did you pay the said share, or any portion thereof, to any of the said complainants? Did you not hold, in March, 1848, in trust for yourself and said Angelo, your brother, real property whose title was vested in you alone absolutely or in fee-simple? Did not you and said Angelo so hold together six houses in the city and county of Mobile whose aggregate cost was more than twenty-three thousand dollars? Did you ever set out to said Angelo his share in said houses, or any part of said share, and when and how? Did you set out said share, or any part thereof, to any of your complainants, and when and how? Did you pay to said Angelo, or to any of your complainants, said Angelo's share in the rents and income from said six houses, collected by you up to March, 1848, or any part thereof, and when and how? 7th. Did you ever have a settlement of any of the accounts between yourself, as trustee, and said Angelo M. Philippi since the departure of said Angelo for Europe in 1845; whether with said Angelo or with any of your complainants, and was such settlement partial or final when made, and how; what was the balance found to be, and in whose favor, and how reached? Did you pay any bal-
57 ance or part of any balance to said Angelo Philippi, or to any of your complainants; when, and where, and how; and did not said Angelo Philippi return to Mobile, finally from Europe, in or about the year 1856; and did he not thereafter request you to account for the partnership's property, and for the real and personal property held by you in trust for him, and to pay or turn over to him his share in said trust property; and did said Angelo not demand money of you on said accounts after his said return; and did you not, from time to time, promise that you would do so? "8th.

Was the partnership existing between you and Angelo M. Philippi in 1848, and since ever dissolved; and when, and how announced, and where, and in what way? And was said partnership ever insolvent; and are there any debts outstanding against the same; has any account been had of the same finally, and any balance struck of its accounts; has any division been made between the partners of its assets, or any partition been made between the partners of its lands? Are not all of the assets, lands, books, accounts, and papers of said partnership in your hands, or subject to your order; if not, how have you disposed of them; when, and for what consideration? And have you, as trustee for said Angelo M. Philippi, closed the trusts, other than said partnership affairs; and have you made any settlement of the same; and when, and how, and whether, with said Angelo Philippi, or any of your complainants? "9th. Did you not take to yourself, as sole grantee, the title to all lands purchased by yourself and herein charged to be trust lands; and have you ever designated said lands by metes and bounds to said Angelo M. Philippi, or any of your complainants? "10th. Have you, since your arrival in Mobile, had any business, source or gain, revenue or profit
58 other than such as arose from the hereinbefore described partnership affairs and trusts, or such as arose from the management of the same, or from transactions connected with or growing out of them; what was the nature of said business, where carried on, when abolished, when relinquished; what was the nature of such other sources of revenue, gain, and profit; where situated, when commencing to exist, and when ceasing; what were the gains, revenues, or profits derived from them in amount or value? "11th. Did you not, after the departure of said Angelo M. Philippi for Europe in 1845, and after said Angelo had placed his herein-described partnership affairs and all other property in Mobile in your hands in trust purchase, and have conveyance made to yourself alone, in fee simple, of the premises described in paragraph eleven (11) of this bill? "12th. Did you ever account to said Angelo M. Philippi, or to any of your complainants, as trustee for said Angelo's share in the rents accruing from the real property described in said paragraph eleven of this bill, and pay over the same to said Angelo or any of your complainants, and when and where, and what portion; did you not retain all such rents in your own possession; and did you not also retain in your own possession or control said Angelo's share in the proceeds of such of said before-described lands as you have sold or conveyed away; and did you not retain in your own possession or control the share of said Angelo in the hire of the slaves held in trust by yourself for yourself and said Angelo in part or in whole; and did you not retain in your possession or control, in part or in whole, said Angelo's share in the net profits of the partnership affairs held by you in trust for yourself and said Angelo; and did you not keep in your possession or control said Angelo's share in the proceeds of the sale of such of said slaves so held by
59 you in trust for yourself and said Angelo, as you sold or conveyed away, either in part or in whole; and did you not also keep in your possession or control, either in part or wholly, the

share of said Angelo in the proceeds of such of the partnership affairs, held by you in trust for yourself and said Angelo Philippi, as you have sold and conveyed away; and having so kept in your possession or control the ten thousand dollars referred to in paragraph (6) six of this bill, and also kept the interest accrued thereon, both in whole or in part; and having so kept in your possession or control, in whole or in part, the share of said Angelo Philippi in the rents and proceeds of the sale of the real property described in paragraph eleven of this bill; and having retained possession or control of the share of said Angelo in the hire of the beforementioned slaves, and in the proceeds of the sale of them in whole or in part, and having so kept in your possession or control, in whole or in part, the share of said Angelo, in the profits and in the proceeds of the sale of the stock and assets of said partnership, did you not invest the same in whole or in part, in all or some portion of the lands and tenements described in paragraph 12 of this bill; and what part, and in what premises? Did you ever set out by metes and bounds to said Angelo M. Philippi, or any of your complainants, the share of said Angelo in said lands, or his share in the proceeds of such of said lands as have been sold and pay over the same to said Angelo or any of your complainants? Did you ever as trustee render account to said Angelo Philippi or your complainants, or any of them, of said Angelo's share in the rents of the said lands described in paragraph twelve of the bill, and have you ever paid over the same to said Angelo or any of complainants? And

60 orators charges that the foregoing interrogatories in said bill were supported by allegations therein contained, and were pertinent to them. Orator charges that the answer made by said defendant to said interrogatories and allegations is the answer of which Exhibit "F," before referred to, is a copy.

19th. Orator further charges that said defendant expressly admitted said trusts hereinbefore described, also on the 30th day of January, 1880, by a writing, signed by himself, in answer to the allegation of this bill, and filed by said defendant as an answer in this cause, a true copy of which is herein annexed, marked Exhibit "G," and prayed to be taken as a part of this bill.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the matters aforesaid, and that as fully and particular as if the same were here repeated, and they and every of them distinctly interrogated thereto, as by the note hereunder written they are respectively required to answer.

JAMES SAINT PHILIPPI.

FRED'K G. BROMBERG,
Complainant's Solicitor.

UNITED STATES OF AMERICA, } ss:
District of Louisiana, }

James Saint Philippi, being duly sworn, deposeth and saith: That

he is the complainant in the foregoing amended bill named, and has read the same, and knows the contents thereof; that the said bill is true of his own knowledge, except as to those matters
61 which are therein stated to be on his information and belief, and as to those he believes it to be true.

JAMES SAINT PHILIPPI.

Subscribed and sworn to before me, Feb'y 27, 1880,

F. A. WOOLFLEY,
Commissioner United States Circuit Court, District of Louisiana.

NOTE.—Each defendant is required to answer each and every paragraph of the amended bill, numbered, respectively, from one to nineteen inclusive.

FRED'K G. BROMBERG,
Complainant's Solicitor.

Copy—EXHIBIT "B."

MOBILE, LI 5 *Mayo* 1847.

ANGELO:

CARO FRATELLO: Ti fo sapere il stato della mi a bona salute come spero che sara di te costi onita a quello dello mostra matre e di tuti li mostri parenti.

Nello stesso tempo rigenerai tutti li paperi che tu mi ai domadoto; credo che questi sarana abbastante per satisfare quelli signiori.

1. Lo certificato del mero come tu non sei maritata ne alla Mobile ne netro lo Stato della Alabama.

2. Piu lo certificato fatto dall mans diem notaro come io tengo 10,000 mila pezzi di tuno netro le mie mano che ti pago li interezzi.

62 3. Tronarai lo certificato fatto clale mano diuno avocato come uno che non e natoralizato ammergano non pode overe nisuna propieta.

4. Emo fatto dalle mono del consolo fronce lo quale Angel M. Philipe inglese vole dire Angel Maria Filippi in italiano, ti fo saperé che loro ano serito al consolo in demadodo di novi informazione lo quale lui a rigento lo lettaro un mese avante che io ongento la tuna origento la tuna li 29 Apprile, che sa io la anessi outa ounti sarebe stata molto avantagasa perti; saristi stato fari delli taubieli pin presto.

Non manchare di soivermi subita cha tu sigeuerai questi carti che saro sempre im pena infino che io non ri geuero lo ris pasta di questi paperi; e poi mi scrimrai lo resultato. Li affari alla Mobile como sempre lo istes come quando te or lacasto; ti diro che 4 garni fo o comprato lo casa nella stradd dolfina dom gori colorm tene lo suno cafe lo quals mida $800 pezzi lano di rentitia.

Alltro non ti duo per lo momento Carlo, nostro cosino, si porta bene e ti saluto a te e a suvo patre e matre e tutti li sur parenti edarai un caro abbraco alla nostimatre e is ti saluto e seno il teno fratello.

ANTONIO FILIPPI.

In scimento questo non avens tempo apperde per esere attempo per la posta.

Copy—Exhibit "C."

Mobile, li 7 *Marzo* 1848.

Angelmaria: Carissimo fratello questo oggi ho riglu to la tura disiderato lettara lo quale mise stata di ona grade consol-
63 azione nell sentire chi siate tutti in bono salute anche jo godo del simile cosi pregiamo che il signiore cela cosnerni in aver-nire, caro fratello te non ti prodensti imaginare la pena che ma fatto nell sentire che sei tanto avanzato addesso che del primo gorno che tu di commicato lo quale jo crendeno chi tutto fasse termniato e che tu fare felige e contento e che tu fusse stato in camino di venire a fan una visita da queste parte onito; calla tuva sposa questa era la oppinione di Carlo a motivo del ritardo della turra littara questa era la consola zime che lui mi dava quondo parlounn di te, e dice come lui non serias ara che sisene arragate con la moglia, e che sarans in comina di venire ma addresso sono sadis fato che e tutto diferento e piago la tuva gatmo fortuna malto pin quando te devi pensare cosa tu eri in questi paesi e ligorni e le sernate cosi agreabile che tu pasoni devise abbastante per fatti fare gatino sangue; ma ima cosa mi consola chi tu ai molta pazzienza, e, firmaza chi conquesta tu tutto sene videra it fina, O caro fratella non ti poderesto imaginari lo disideno che io avarbe di essere a conto a te per posderti consolare jo sarebe veinito nia di non essere siguro se avereba poduto fan niurite per to sono qui a soffrire la parte delli tuvi distorbi addeza parlianio un pogo delli nostri affari te diro che ho aragoto li conti lo primodi novebre lo quali il benefizio della affari che tenenio insieme sono 8,000 sudi, 4,000 scudi te lo marchats all turo credito le qual voglio che tu mi facia sabere case ne deno fare se voi che tile mondo ho puri voi che il faccia cormeciare all tuno conto, da pai che sü partito o fatto dille compre la casa dove sto micasta $13,000 sendi, mo fatto fabricase vina molta billa nella strada dalfria costa $7,000 sendi, comprato una nella stessa strado lo quale te la conosci
64 dove sta colobo che tene lo caffe costa $6,000 scudi, cosi conte 6 case *case* che noi tengonai, elle negra midono di in tresso la soma di 4,500 sccedi a lalm serrza contare lo nostio ammercio, con caro fratella tu sai bene che cosa. Ennise stato e sempre saia luvo a tu sono per suvaso du li tuvi sentimente sono di stesso per questo ti vaglio dire che non di bisagnis che lo intersso non ti tenga ne aliconico midardi un caro abbracco alla nostro cara matre ne faco del simile a te.

A. FILIPPI.

Carissimo cocino non ti podaristi in aginare il piagere la contentaza di sentire che tu e li miei genitari e tutti li nostri parento sono tutti in bona salute onche io graziado a dio gado dell simile vylio che tu mifacio il piagere di dare 30 franchi lo mese alli miei genitaro in fino a novo ardine mi farar il piagere, tutti li nostri poesane si portano tutti bene mi dara un caro abbraco alli miei genitari tutti li miei parenti Carlo Pietro Antomardie.

I, N. W. Trimble, clerk U. S. circuit court, sou. dist. Ala., hereby certify the foregoing letters marked "copy Exhibit B," and "copy Exhibit C," are true and correct copies of the originals, as shown me by Mr. F. G. Bromberg, counsel for the complainant in the cause of J. S. Philipe *vs.* Antonio Philipe *et als.*, as far as I could tell from a careful comparison with the original.

In witness whereof, I hereunto subscribe my name and cause the seal of said court to be affixed, this the first day of March, A. D. 1880.

N. W. TRIMBLE, *Clerk. &c.*

65 EXHIBIT "D."

Translation.

MOBILE, *the* 5 *May*, 1847.

ANGELO:

DEAR BROTHER: I let you know the state of my good health, as I hope it will be so with thee, as well as that of our mother and of all our relations. At the same time you will receive all the papers which thou hast asked of me. I believe that these will be enough to satisfy those gentlemen. 1. The certificate of the mayor, as thou wert not married in Mobile, nor in the State of Alabama. 2. Further, the certificate made by the hand of a notary as (that) I hold 10,000 dollars of thine in my hands which I pay thee interest. 3. Thou wilt find the certificate made by the hand of a lawyer that one who is not a naturalized American cannot hold any property. 4. One made by the hand of the French consul that Angel M. Philipe, in English, means to say, Angelo Maria Filippi in Italian. I let you know that they have written to the consul demanding new information, which letter he received a month before I received yours. I have received thine the 29th April, which, if I had it sooner, would have been very advantageous for thee, so that thou wouldst have been out of the trouble sooner. Thou wilt not fail to write me as soon as thou shalt receive these papers, because I will always be anxious until I receive an answer to these papers, and then thou shalt write me the result.

The affairs in Mobile are always the same—just as when thou didst leave. I will tell thee that 4 days ago I bought the house on Dauphin street, where George Colom keeps his bar-room, which gives me $800 dollars a year rent. Nothing more will I tell thee
66 now. Carlo, our cousin, is well, and salutes thee and his father and mother, and all his relations, and thou wilt give an affectionate embrace to our mother, and I salute thee and am thy brother.

(Signed) ANTONIO FILIPPI.

In writing this there is no time to lose, in order to be in time for the mail.

EXHIBIT "E."

Translation.

MOBILE, *the 7 March*, 1848.

ANGELO MARIA:

DEAREST BROTHER: This day I have received they desired letler, which has been to me a great consolation to know that you are all in good health; also I enjoy the same, thus let us pray that the Lord may preserve it to us in future. Dear brother, thou couldst not imagine the pain it has caused me to hear that thou art as far advanced now as on the first day when thou didst begin, which I thought that all was terminated, and that thou wert on the way to come to pay a visit to these parts, also with thy wife. This was the opinion of Carlo on account of the delay of this they letter. This was the consolation which he gave me when he spoke of thee. He says as he does not write he has arranged with his wife, and that they are on the way to come, but now I am satisfied that all is different. And I lament your bad fortune the more when thou must think what thou wast in these countries, and the pleasant days and evenings which thou didst pass are enough to make the bad blood. But one thing consoled me—thou hast great deal of patience and firmness; that thou wilt overcome all and see the end
67 of it. O, dear brother, thou couldst not imagine the desire I would have to be at thy side to be able to console thee. I would have come but for not being sure whether I could have been able to do anything for thee. I am here to bear the part of thy troubles. Now let us speak a little of our affairs. I will tell thethat I have arranged the accounts the first of November, on which the profit of the affairs which we hold together are 8,000 dollars; 4,000 dollars I have marked them for thee to thy credit, which I wish that thou make me know what I must do with it. If thou wishest that I send them to thee, or wishest that I should do business with them for thy account. Since thou hast left I have made purchases; the house in which I am, $13,000 dollars. I have had a very beautiful one built on Dauphin street, cost $7,000 dollars; bought one in the same street, which thou knowest, where Colobo keeps his bar-room, cost $6,000 dollars, thus counts 6 houses which *we* hold. The negroes give me of interest the sum of 4,500 dollars a year without our trade. Thus, dear brother, thou knowest well what is mine has been and always will be thine, and thou I am persuaded thy sentiments are the same. For this I wish to tell thee that thou hast no need that the interest should keep thee melancholy. Thou wilt give for me a dear embrace to our dear mother, and a like I make to thee.

(Signed) A. FILIPPI.

68 EXHIBIT "F."

A transcript of the petition of A. Philipe, filed in a certain cause heretofore pending in the honorable court of chancery, held in the city of Mobile, for the first district of the southern chancery divi-

sion of the State of Alabama, wherein Angela Francheschi Philippi, individually, and as administratrix of Angelo Maria Philippi, dec'd, James Saint Philippi, adults, Louis Philippi, Angelo Philippi, and Louisa Philippi, minors, are complainants, and Antonio Philippe is defendant.

Petition of A. Philippe.

In the Mobile Chancery Court, Southern Chancery Division of Alabama, Hon. H. Austill, Chancellar, Presiding.

HEIRS OF PHILIPPI
vs.
ANTONIO PHILIPPE. } Mobile Chancery Court.

In the cause now pending in said court, wherein Angella Francheschi Philippi, James S. Philippi, Antonio Philippi, and Eugene Philippi, adults, and Louis Philippi and Louisa Philippi, minors, are complainants, and Antonio Philippi is defendant.

The petition of said Antonio Philippi, defendant, respectfully shews:

That a bill has been filed in the chancery court of Mobile by the widow, administratrix, and the heirs at law of Angelo M. Philippi, above named, against your petitioner, praying for relief or a case stated by them in their bill. That in said bill it is claimed that there are partnership accounts unsettled between the parties, and in addition to this, in the fifth paragraph of the bill, it
69 is charged that "said Angelo M. Philippi was reputed and claimed to be a man of considerable wealth; that in or about the year 1845, aforesaid, said Angelo returned to France on a visit, and placed all of his affairs and property of every kind and description in the city of Mobile aforesaid in the keeping of his brother, the defendant, to manage and invest for him, the rentals, income, and profits of said property and business, and your complainants charge that said defendant expressly accepted said trust, and also evidenced and acknowledged the same by writings signed by himself." The said bill charges that large sums were held in trust by this defendant for said complainant for which he seeks an account.

Your petitioner further shews that it is asserted by said complainants, or some of them, or their counsel, that they have letters or writings, signed by this defendant, which are conclusive to establish the fact of large indebtedness, and that the relation of trustee existed as charged.

Your petitioner shews positively that in truth and in fact he did not owe to the said Angelo Philippi (who was his brother) any amount whatever at the time of his decease, as is pretended in said bill, but that on the contrary he was indebted to this defendant.

Your petitioner further shews that by said bill he is required to answer the said fifth paragraph of the bill, and is therefore called on to admit or deny that he did make a writing under his hand express acceptance of such trusts and acknowledgment of the same.

And your petitioner shews that without inspection of the said

writings so charged to have been made by him, he cannot answer correctly as called on, the same purporting to have been made thirty years ago or more. That he cannot say whether the said
70 complainants have any such writings having the force and effect as charged or not, nor whether they have in fact any writings signed by your petitioner, nor whether, if they have such, the writings purporting to be signed by your petitioner are genuine or false, altered or unaltered.

Your petitioner further says that he is advised by his counsel that they are unable to prepare a proper answer to said charge of having executed said writings or not with the forces and effect charged, nor what may be the legal construction of such writings and written acknowledgments, without inspection thereof, and your petitioner himself says that it is impossible for him to answer said charge correctly without exhibition of the same to him.

In consideration of all which, and because the counsel of the complainants have, on application of the counsel of your petitioner, refused to submit the same to his inspection, your petitioner prays that an interlocutory order be made in this cause, requiring the said complainants to deposit in the register's office all such papers signed by your petitioner as may be referred to in their said bill, and to be relied on to charge your petitioner in said controversy, for the inspection of your petitioner and his counsel (and so that they may have copies thereof) for such length of time as your honor may deem proper, and before your petitioner be required to answer said bill.

A. PHILIPE.

STEWART & PILLANS,
Solicitors for Pet'r.

Subscribed an- sworn to before me April 26th, 1877.

JOSEPH HODGSON, *Register.*

Filed April 26. '77. JOSEPH HODGSON, *Register.*

71 Complainants accept service of this petition, and waive further notice.

April 27th, 1877. FRED'K G. BROMBERG, *Solicitor.*

In Chancery, at Mobile.

THE STATE OF ALABAMA, *First District, Southern Division:*

I, Joseph Hodgson, register in chancery for the first district of the southern chancery division of the State of Alabama, do hereby certify that the foregoing five pages and five lines of written matter contain a true and complete copy of the petition of A. Philipe, filed in a certain cause heretofore pending in the court of chancery for the district and division aforesaid, wherein Angella Francheschi Philippi, individually and as administratrix of Angelo Maria Philippi, dec'd, and others are complainants and Antonio Philipe is defendant, as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand & affixed the seal of said court of chancery, this 30th day of January, A. D. 1880.

JOSEPH HODGSON, *Register.*

EXHIBIT "G."

Circuit Court of the United States. In Equity. Mobile.

J. S. PHILLIPE *vs.* ANTONIO PHILLIPPE.

72 Antonio Phillippe, defendant in this cause, being duly sworn, deposes and says:

That it is wholly untrue that he is in any manner indebted to the heirs of Angelo M. Phillippe as is charged in the complainant's bill; that on the contrary, when he died, said Angelo was indebted to him.

He says it is not true that when he, this affiant, came to Mobile that he was without means, and that he was in any manner dependent on his brother; but that he brought considerable means with him.

That soon after his arrival he purchased a female slave for the sum of six hundred and fifty dollars, which he paid, as is shown by the bill of sale herewith exhibited, with means he had brought with him.

He says that it is not true, as charged in said bill, that the saloon at the northwest corner of Royal and Conti streets, which was the one last stated to have belonged to him, the said Angelo, and which was kept by him and this affiant jointly, was, on the contrary, purchased by him, the said Antonio, individually, for his own account, and with his own means. That he individually purchased the said establishment and paid for the same with his own means, for the sum of $4,000, paid with his own money on the 27th of May, 1843, as is shown by the bill of sale made to him on said purchase, now herewith shown, and he afterwards purchased the building and paid ten thousand dollars for it.

This defendant further says that the said Angelo Phillippe returned from Europe to Mobile in the year 1853, as to which nothing is said in the complainant's bill. That while here then and before he left again a full settlement was had between him and this affiant of all matters of account; and that on said settlement a balance was found to be due from said Angelo to this affiant, which amounted to over nine hundred dollars, which never was paid.

73 This affiant further shows that in the year 1872 the said Angelo kept a drinking saloon in the city of Mobile, and that the same was destroyed by fire. That he claimed the sum of $4,000 from the Andes Insurance Company on a fire policy, which became a subject of litigation, and being destitute he applied to this affiant for a loan of money to maintain his family until he could recover the insurance money; and that thereupon this affiant lent him eight hundred dollars, with the agreement that the amount was to be repaid to this affiant out of the insurance money when collected, which is shown by the writing signed by said Angelo now on file in the Mobile chancery court.

That on a compromise said Angello was allowed the sum of three thousand dollars, but he owed debts to a larger amount, and his

creditors set forth their claims upon said fund in the chancery court of Mobile.

That in said cause the matter was referred to the Hon. Wm. G. Jones as arbitrator, to settle the matter, and by publication the creditors were called in. That the said Angello made oath that—

"That he is entirely destitute of property, except the money and proceeds coming to him from the said policy of insurance. That it constituted all the property he had in the world, except a few articles of household furniture and wearing apparel for his family, which he is advised by law is exempt from execution and levy. And this affiant now shows to the court that he is advised by counsel that he is entitled to one thousand dollars as exempt from attachment, levy, or garnishment, and he claims this amount shall be left to him unaffected by the creditors or any of their proceedings in this cause," &c.

And this affiant shows that he presented his claim for the
74 money so lent by him before the said arbitrator, and by his award he allowed to said Angello Phillippe the sum of nine hundred and fifty-nine dollars and two cents out of said insurance money for his exemption, and he allowed to your affiant the sum of $329.27 as his *pro rata* share in the distributive share of said fund on his claim of $858.71 due him; and he allowed to the other creditors their *pro rata* shares in the same proportion, by his award made on the 18th Nov., 1873.

All which is fully shown by the copies of record in said chancery court of Mobile herewith filed, on which award your affiant received said sum of $329.27 in part payment of his debt, and the remainder never was repaid.

The said Angelo died insolvent in 1874.

(Signed) A. PHILIPE.

Sworn to be correct and true, and subscribed by said Philipe, before me, this 30th day of January, 1880.

(Sign'd) HENRY S. SKAATS,
U. S. Commissioner, So. District, Ala.

STEWART & PILLANS,
Sol's for Def't.

Filed January 30th, 1880.

(S'gn'd) N. W. TRIMBLE, *Clerk.*

I, N. W. Trimble, clerk of the circuit court of the United States for the southern district of Alabama, hereby certify the foregoing to be a true and correct copy of the affidavit of A. Philipe, filed in the above-entitled cause, on the 30th January, A. D. 1880, as the same appears on file in my office.

75 In testimony whereof I hereunto subscribe my name and cause the seal of said court to be affixed, this 20th day of February, A. D. 1880.

N. W. TRIMBLE, *Clerk.*

Filed March 1st, 1880.

N. W. TRIMBLE, *Clerk.*

76 *Demurrer.*

In the Circuit Court of the United States, Southern District of Alabama, at Mobile. In Chancery.

J. S. PHILLIPE
vs.
ANTONIO PHILIPE *et als.* } Amending bill.

The demurrer of Antonio Philipe, defendant, to the amended bill of the said J. S. Phillipe, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint, as amended, to be true, in such manner and form as the same are therein and thereby set forth and alleged, doth demur in law to the said amended bill, and for cause of demurrer showeth that the said complainant hath not, by his said bill, made such a case as entitles him in a court of equity to any discovery or relief from and against this defendant, touching the matters and things contained in said bill, or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in the said amended bill of complaint, this defendant doth demur to the said amended bill, and to all the matters and things therein contained, and prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said amended bill, and he prays to be hence dismissed, with his reasonable costs in this behalf sustained.

STEWART & PILLANS,
Sol's for Defendant.

And for causes of demurrer the said Antonio Phillipe shews to the court in relation to said amended bill—

77 1. That the said complainant sues as one of divers heirs-at-law to demand a settlement and account of partnership and other money demands, claiming the same to be due and payable from the defendant Phillipe, and to have been due to and demandable from him by the said Angelo M. Phillipe, father of the complainant, in his lifetime, under whose right he claims on account in his said amended bill, whereas no such claim for account can be sustained by this honorable court, and no such account is due from said defendant to him, the said complainant, as is prayed in said bill, and no decree can be properly rendered according to the rules of this court on such a claim to him, the said complainant, in this behalf.

2. That the said amended bill seeks relief on transactions on which the decedent, Angelo M. Phillipe, and the complainants claiming under him, have slept so long on the rights now claimed by said amended bill that, by reason of long delay, such demand cannot now be heard, entertained, and decided by reason of the impossibility of the ascertainment of the truth of matters asserted, by loss of evidence, of memory, and the proper means of correct decision,

wherefore such claims cannot be entertained at so late a day as in the present case.

3. That the allegations of the said amended bill do not present such a case of express trust which is claimed under said bill, nor any right to a demand by said complainant to an account on the footing of a subsisting or other trust of any kind from said defendant to said complainant.

4. That the allegations of said amended bill do not present with sufficient clearness, nor in a satisfactory manner, a case where
78 the obligations of the defendant to account as a trustee of any description appears; that no trust is set forth sufficiently, nor its terms, extent, obligation, or duties sufficiently defined to create such a trust as the court would be entitled to act on as a technical trust.

5. That the demand shown by the bill is unavailing, and cannot be enforced in this court, because the same and all relief thereon is barred by the statute laws of limitations severally in force in the State of Alabama; that is to say, the statute of twenty years, also the statute of ten years, and also the statute of six years, and the statute of said State by which demands asserted in courts of chancery are barred by the same terms of time as demands in courts of law, wherefore all the claims of interest in lands, as well as demands of money or of the value of property, and all causes of action arising on the face of the said amended bill, as set forth and charged therein, are barred by limitation, and were so at the time of the decease of said Angelo M. Phillipe, at the time of the filing of the original bill in this cause, and also of the filing of the amended bill now pending.

6. That by the supplemental allegations added to the original ones in this amended bill it is shown that on the 26th of April, 1877, at the time of the filing of the petition shewn of said date by this defendant, there was pending in the chancery court of the county of Mobile, State of Alabama, a cause in which the now complainant, jointly with his mother and sisters and brothers, were complainants, and this defendant was a defendant in said litigation, and which cause is shewn by this amended bill to have been for the same subject matter and recovery as the claim and demand now sought to be recovered, and in which allegation it is strangely as-
79 serted, in direct contradiction of the said petition so set forth, that the same was filed as an answer to the said bill in chancery then pending, and contains no admission of trust, as falsely stated; but in which supplemental allegation introducing and setting forth the fact that such suit in chancery was then pending, but withholding from this court and omitting the information as to what was the result of said former litigation in said State chancery court, and whether the same is or is not still depending and undetermined, or if determined, whether the decision therein was in favor of the said complainants or of this defendant, or how disposed of, or if disposed of at all. This defendant is advised that the said supplemental allegation contains and sets forth no matter requiring an answer to the same from this defendant to said allegation, and, in-

deed, dispenses this defendant from the necessity of making any answer whatever to the said amended bill in this court.

7. That in like manner the supplemental allegation, setting forth that the affidavit made by this defendant on the 30th of January, 1880, in this cause, and after the rendition of the decree in this cause, and before the filing of this amendad bill, and strangely alleged to be in answer to the bill in this cause, and falsely stated to contain an admission of the trusts claimed and complained of in this cause, is, as this defendant is advised, an allegation to which this defendant is not bound by the law and rules of this court to make answer to.

8. That the recital in the bill of complaint in this cause, that the decedent, Angelo M. Phillipe, did declare that he was unwill-
80 ing to institute any proceedings in courts against this defendant in relation to the subject-matter of this bill, which intent and declaration was followed up from the year 1856 until the time of his decease, exhibiting an intentional and wilful determination not to assert said claim legally in any manner, whatever might have been his motive, shews a conclusive bar to any decree in respect thereto by the complainant in this bill who claims under him.

STEWART & PILLANS,
Sol's for Defendant, A. Phillipe.

I, George N. Stewart, counsel and solicitor for the defendant, Antonio Phillipe, defendant in the above-entitled cause, do hereby certify that in my opinion the demurrer foregoing to said amended bill is well founded in point of law.

GEORGE N. STEWART.

Mobile, March 22, 1880.

Antonio Phillipe, defendant in the foregoing cause, being duly sworn, deposes and says: That the foregoing and within demurrer to the amended bill of James S. Phillipi against him, the said Antonio, filed in this court, is not interposed for delay.

A. PHILIPE.

Sworn and subscribed before me, this 23rd day of March, 1880.

N. W. TRIMBLE, *Clerk.*

Filed March 23rd, A. D. 1880.

N. W. TRIMBLE, *Clerk.*

81 *Decree Dismissing Amended Bill and Appeal.*

[JAMES S. PHILIPPE *vs.* ANTONIO PHILIPPE *et al.*]

This cause coming on to be heard upon the amended bill of complaint, and upon the demurrers filed by the respondent, Antonio Philippe, thereto, and the same having been argued by the respective counsel for the complainant and said respondent, it is ordered, adjudged, and decreed that the said demurrers be sustained, and the said amended bill be dismissed, and that complainant pay the costs of this suit.

And notice having been given, in open court, by Frederick G. Bromberg, solicitor for complainant, of an appeal to the Supreme Court of the United States from said decree, George N. Stewart and Harry Pillans, Esq., solicitors of record for the said respondent, being present, it is ordered that said complainant's said appeal be allowed upon his depositing three hundred dollars as security for costs, or executing a bond with good security in the amount of three hundred dollars for costs of appeal.

June 17, 1880.

(S'g'd) JOHN BRUCE, *Judge.*

82 *Appeal Bond.*

Supreme Court of the United States.

JAMES S. PHILIPPI, Complainant,

vs.

ANTONIO PHILIPPE *et al.*, Respondents.

Know all men by these presents, that we, James S. Philippi, Simon Damiani, and Albert V. Caro, of Pensacola, in the State of Florida, are held and firmly bound unto Antonio Philippe, Angela F. Philippi, individually and as administratrix of Angelo M. Philippi, deceased; Eugene Philippi, Antonio Philippi, Louis Philippi, Angelo Philippi, and Louisa Philippi, in the sum of three hundred dollars, to be paid to the said Antonio Philippe, Angela F. Philippi, Antonio Philippi, Eugene Philippi, Louis Philippi, Angelo Philippi, and Louisa Philippi, their executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Seals with our seals. Dated this twentieth day of April, A. D. one thousand eight hundred and eighty-two. Whereas the
83 above-bounden James S. Philippi hath taken an appeal to the Supreme Court of the United States to reverse the decree entered in the above-entitled action by the circuit court of the United States for the southern district of Alabama, fifth judicial circuit of the United States of America: Now, therefore, the condition of this obligation is such that if the above-named James S. Philippi shall prosecute his said appeal to effect and answer all costs, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JAMES S. PHILIPPI.
SIMON DAMIANA.
A. V. CARO.

Sealed and delivered in presence of—
JAMES L. ROCHE.
JAMES D. THOMPSON.

84 THE STATE OF FLORIDA, *County of Escambia:*

I, Simon Damiani, of said county, a surety named in the foregoing bond, being duly sworn, do depose and say: That I am a resi-

dent of the State of Florida; am a property holder therein; that I am worth the sum of six hundred dollars over and above all my debts and liabilities, and exclusive of property by law exempt from execution; that I have property in the State of Florida liable to execution of the value of more than four hundred dollars.

SIMON DAMIANI.

Subscribed in my presence by Simon Damiani, and by him sworn to before —, this 20th day of April, A. D. 1882.

W. W. WHARTON,
Clerk U. S. Circuit Court, Nor. Dist. of Florida.

THE STATE OF FLORIDA, } ss:
County of Escambia, }

I, Albert V. Caro, of said county, a surety named in the foregoing bond, being duly sworn, do depose and say: That I am a
85 resident of the State of Florida, and a property holder therein; that I am worth the sum of six hundred dollars over and above all my debts and liabilities, and exclusive of property by law exempt from execution; that I have property in the State of Florida liable to execution of the value of more than two hundred dollars.

(S'g'd) A. V. CARO.

Subscribed in my presence by Albert V. Caro, and by him sworn to before me, this 20th day of April, A. D. 1882.

W. W. WHARTON,
Clerk U. S. Circuit Court, Nor. Dist. of Florida.

The foregoing bond is hereby approved, April 29, 1882.

(Signed) JOHN BRUCE, *Judge.*

Filed May 3rd, 1882. N. W. TRIMBLE, *Clerk.*

86 I, N. W. Trimble, clerk of the circuit court of the United States for the southern district of Alabama, hereby certify that the foregoing pages, numbered from one to eighty-five, inclusive, is a full, true, and complete transcript of all the papers and the proceedings had thereon in the case of J. S. Philippi against Antonio Philippe *et als.*, as the same appear on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the circuit court, this 2nd day of September, A. D. 1882.

[SEAL.] N. W. TRIMBLE, *Clerk.*

87 By the Honorable John Bruce, one of the judges of the circuit court of the United States for the southern district of Alabama, to Antonio Philippe, Antonio Philippi, Eugene Philippi, Angela F. Philippi, personally and as administratrix of the estate of Angelo M. Philippi, deceased; Louis Philippi, Angelo Philippi, and Louisa Philippi:

Whereas James S. Philippi has lately appealed to the Supreme Court of the United States from a decree lately rendered in the cir-

cuit court of the United States for the southern district of Alabama, made in favor of you, the said Antonio Philippe, and has filed the security required by law; you are hereby cited to appear before the Supreme Court, at the city of Washington, on the second Monday of October next, A. D. 1802, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Montgomery, in the middle district of Alabama, in the fifth circuit, the 10th day of May, one thousand eight hundred and eighty-two.

JOHN BRUCE, *Judge.*

88 We, Eugene Philippi, Angela F. Philippi, personally and as administratrix of the estate of Angelo M. Philippi, deceased, and also as the next friend of Angelo Philippi, Louisa Philippi, and Louis Philippi, minors, residing with me, said Angela F. Philippi, accept service for ourselves and for said Angelo Philippi, Louisa Philippi, and Louis Philippi of the within citation, and waive all further notice of said appeal.

Done at Montgomery, Ala., the 11th day of May, 1882.

EUGENE PHILIPPI.
ANGELE F. PHILIPPI.

Witness:
FRED'K E. BROMBERG.

I, Antonio Philippi, hereby accept service of the within citation and waive all further notice of said appeal.

Done at Pensacola, in the State of Florida, this the 12th day of May, 1882.

ANTONIO PHILIPPI.

Witness:
WILLIAM SINNER.

[Indorsed:] Rec'd in office, May 17, 1882. M. C. Osborn, U. S. marshal. The defendant, Antonio Philippe, not found within this county. Executed by leaving a copy of the within citation at his residence in the port of Mobile, and a copy of the same with Harry Pillans, Esq., one of his counsel of record. May 17, 1882. M. C. Osborn, U. S. marshal, by W. B. Hughes, deputy. Service, 2 copies, $4.00. Filed May 17th, 1882. N. W. Trimble, clerk.

89 *Assignments of Error.*

The court erred in sustaining the demurrer to the original bill of complaint in this:

1st. That, in declaring upon express trusts, it is not necessary to set out in the bill of complaint the writings by which, it is alleged, such trusts are evidenced. The writings are evidence to be produced at the hearing.

2d. That, at the date of the alleged creation of said express trusts, such trusts in lands could be created by parol in the State of Alabama.

The court erred in sustaining the demurrers to the amended bill of complaint in this:

3d. The general demurrer to the bill for want of equity, because the bill alleged an express trust; alleged that there had been no settlement made or repudiation by the trustee of said trusts; that the said trusts were evidenced by writings signed by the defendant trustee, and said bill set out said writings in full, showing the nature of the trust property and the *cestui que trust;* and further, said bill alleged admissions of said trust made by said defendant trustee in writings, in 1877 and 1880, signed by him; and

4th. Because, at the alleged data of the creation of said ex-
90 press trusts, such trusts in lands could be created by parol in the State of Alabama.

5th. The demurrer to the amended bill numbered "1," because the administratrix of the estate of the deceased *cestui que trust,* and all of the heirs of the deceased *cestui que trust,* according to the law of descents and distributions in the State of Alabama, are made parties to the bill.

6th. The demurrer numbered "2," because the bill shows an express trust manifested by writings signed by the demurrant trustee, which are set out in the bill, and evidenced by subsequent admissions in writings signed by the demurrant trustee in 1877 and 1880, which are set out, and shows that there has been no repudiation of the trust, nor settlement made by the demurrant trustee, with the *cestui que trust* or his heirs; and said demurrer is a "speaking demurrer," in that it sets up matters of defence and evidence *dehors* the bill, in alleging "loss of evidence, of memory, and proper means of a correct decision" as matter of demurrer to the bill.

7th. The demurrer numbered "3," because the bill alleges an ex-
press trust, and because no formality is required to create
91 such trusts, and because in the State of Alabama such trusts in lands could be created by parol at the alleged date of said trusts, and because a court of equity will take cognizance of a trust and require the trustee to account to the *cestui que trust,* until there has been a final settlement between them, or the trustee has openly repudiated his trust for a sufficient length of time to raise the bar of a presumed settlement.

8th. The demurrer numbered "4," because the bill shows the writings signed by the demurrant, and addressed to the *cestui que trust,* and also answers in chancery, admitting the trust, describing in detail the subjects of the trust; and because no formality is necessary to create an express trust, and the same may be evidenced by letters and by answers in chancery; and because, at the alleged date of the creation of said trusts, trusts in lands could be created by parol in the State of Alabama.

9th. The demurrer numbered "5," because limitations are creatures of statute, and there is no statute of limitations in the State of Alabama applicable to express trusts; and because twenty years are required in said State by an analogy to bar even an implied trust;
and because the bill shows that, if the period of the civil war
92 be excluded, twenty years have not elapsed since the return of the *cestui que trust* from Europe, at the time this bill was

filed; and because the bill shows that the purpose of the trust was the care of the property by the trustees whilst the *cestui que trust* should be in Europe.

10th. The demurrer numbered "6," because said demurrer shows matter of plea or answer, but no reason in law why the demurrant should not be required to answer said allegations.

11th. The demurrer numbered "7," because said demurrer shows matter of plea or answer, but no reason in law why the said demurrant should not be required to answer said allegations.

12th. The demurrer numbered "8," because the bill shows that the trustee and *cestui que trust* were brothers, and shows, therefore, a *cestui que trust* not held by a court of equity to the same vigilance and diligence as a stranger; and because the bill shows also the poverty of the *cestui que trust*, and therefore shows a case of less presumption of settlement between demurrant trustee and said *cestui que trust*.

For all of which errors of said circuit court the appellant respectfully prays that this court will reverse said decrees of said circuit court sustaining said demurrers to the bill and amended bill of complaint.

JAMES S. PHILLIPPI, *Appellant*,
By his Solicitor, FREDERICK G. BROMBERG.

Endorsed on cover: S. Alabama C. C. U. S. No. 268. James S. Philippi, appellant, *vs.* Antonio Philippe, Antonio Philippi, Eugene Philippi, Angela F. Philippi, personally and as administratrix of Angelo Philippi, dec'd; Louis Philippi, Angelo Philippi, and Louisa Philippi. Filed 16th September, 1882.

115-151

Brief for the Appellant

Supreme Court of United States

OCTOBER TERM, 1884

No. 268.

JAMES S. PHILIPPI, Appellant,

vs.

ANTONIO PHILIPPE, et al, Apellees.

Appeal from the Circuit Court of the United States, for the Southern District of Alabama.



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Appeal from the Circuit Court of the United States, for the Southern District of Alabama.

Statement of the Case.

This appeal is prosecuted from a decree of the Circuit Court of the United States for the Southern District of Alabama, sustaining the demurrers of the appellee, Antonio Philippe, to the amended bill and dismissing the same absolutely.

The Pleadings.

The original bill shows, that the appellant is the son of Angelo M. Philippi, (or Fillippi), who died intestate at Mobile, Alabama, in 1874; that said intestate was a native of the Island of Corsica, France, and came to Mobile in the year 1835, and engaged in business as a saloon and boarding house keeper; that he was thrifty and prospered, so that in 1840 he was deemed a man of means.

The bill shows further, that about the year 1840 or 1841, the appellee, Antonio, the younger brother of said intestate, came also to Mobile; that said Antonio was then apparently in humble circumstances and without occupation; that Angelo, appellant's said father took said Antonio by the hand, lodged him, gave him employment, and finally associated him with himself in business, upon equal terms; that their joint affairs continued to prosper and in 1845 the elder brother determined to revisit his native land; that upon his departure he placed all of his property in Mobile, in the custody of said Antonio to manage and invest for him, which trusts Antonio accepted, and which he subsequently evidenced by letters written and signed by himself; that Antonio continued, also to carry on the partnership business in which they had been previously engaged, for the joint benefit of himself and his brother, said Angelo.

The bill shows further, that in the meantime Antonio managed his brother's affairs and the joint business in Mobile with skill and success; that the magnitude of this property and said business was such that in May 1847, Antonio held the sum of $10,000 dollars belonging to said Angelo, upon which he was to pay Angelo interest; that for

the year ending November 1847, the profits of the joint business were $8000 dollars; and that the joint income from their slaves for the period was $4500; that for a time Antonio kept true accounts of these profits and incomes, fixing Angelo's shares therein: that he invested these accumulated gains of himself and his brother, Angelo, in real estate taking, however, the titles in his own name only.

The bill further shows, that in the year 1848 said Antonio held as the joint property of himself and said Angelo, six houses and lots in the city of Mobile, valued at $26,000 dollars; that said Antonio subsequently to 1848 bought a large amount of real estate, shown in detail in exhibit "A" to the bill, (pages 9—12 Record), which he paid for out of the profit and incomes derived from said trust funds and from the slaves, business and bounty, jointly owned by himself and his brother.

The bill further shows, that during their long separation the relations of the brothers continued harmonious, and that a brotherly correspondence was kept up between them; that finally Angelo returned to Mobile in 1856, and called upon his brother for an accounting of their co-partnership affairs, and of the trust property; that he was met by promises of settlement which were never fulfilled.

The bill further shows, that Angelo being of foreign birth, and imperfectly acquainted with the English language, and being also, a man of few associates, and those few foreigners, ignorant as he himself was, of the English language, never became fully informed of his rights and remedies under the laws of this country against his brother said Antonio; that moreover. he was averse to litigating with his brother and chose rather to hope that his brother would ultimately fulfill his promise to account to him and to render him what belonged to him.

The bill shows that said Angelo died on the first of May, 1874, leaving his family, whom he had sent for in 1867 to come to this country, in want; telling them, however, that, after his death, they need not be controlled by the considerations, which deterred him, in his lifetime from proceeding against his brother, said appellee.

The bill was amended by adding to the foregoing, as exhibits "B," "C," "D," and "E," (pages 32-35 Record), the letters written by said Antonio to his brother acknowledging the trusts charged therein.

The bill was also amended by adding thereto a writing made by the appellee, shown in exhibit "F" to the bill, (pages 35-37 Record) and showing that said writing, taken in connection with a bill in the State Chancery Court, was an admission of the existence of the trusts charged in the bill, made by said appellee on the 26th April, 1877.

The amended bill also showed that said appellee, Antonio Philippe, had made another written acknowledgment of the trusts charged in the bill, by a sworn statement filed by him in this cause on the 30th January 1880, shown as exhibit "G" to the amended bill, (pages 38-29 Record).

The Demurrers to the Bill.

The appellee Antonio Phillippe, demurred to the original bill for want of equity, both generally and for ten causes specially assigned, —pages 15-17 Record.

The demurrers were argued January 17th, 1880, and the court, Judge Woods, presiding, rendered a decree "that the said demurrer is well taken, and the same is therefore sustained, and it is further ordered that complainant have leave to amend his bill of complaint." Page 18, Record.

The appellee then moved the court to set aside the order granting

the appellant leave to amend his bill, and supported his motion by a sworn statement,—pages 18--20, Record,—and by a transcript of proceedings in the State Chancery Court,—pages 20--26, Record.

The court denied said motion—page 26, Record—and the appellant amended his bill as before related.

The appellee, said Antonio, then demurred to the amended bill generally and for eight especially assigned causes,—pages 40--42, Record.

The court, Judge Bruce presiding, sustained all of the demurrers and decreed that the bill be dismissed. Page 42, Record.

This appeal was then taken.

Assignments of Error.

The appellant, James S. Philippi, here assigns for error :

1. The decree of the court sustaining the demurrer to the original bill,—page 18, Record.

2. The decree of the court sustaining the demurrers to the amended bill,---page 42, Record.

3. The decree of the court dismissing the amended bill,--page 42, Record.

Argument.

I.

The court erred in sustaining the demurrer to the original bill, (Record, page 18).

The bill was not formally defective.

The trusts charged therein were created before the 17th January, 1853, the date when the code went into effect in Alabama.

Palmer vs Bice, 28 Alabama, 431.

Previous to said date trusts in lands could be created by parol in Alabama.

Patton vs Beecher, 62 Ala., 579--586.

Besides, it was unnecessary to set out the writings evidencing a trust. They are evidence.

Bishop vs Bishop, 13 Ala., 475.

1 Perry on Trusts, (3d Ed.) Sec. 84.

II,

The court erred in sustaining the general demurrer to the amended bill for want of equity, (Record page 40.)

1st. In the first place it was *res ad judicata,* that the bill had equity. Not only had the court below after the interposition of a demurrer to the same effect, (Record page 15), allowed the appellant to amend his bill, (Record page 18) ; but further denied a motion made to set aside the order allowing the amendment, (Record pages 18–26).

Unless the bill had substantially equity, it was not susceptible of amendment.

No appeal was taken from these orders by the appellee, and they are the law of the case.

2d. Independently of these previous rulings of the court, the general demurrer should not have been sustained, because the bill clearly alleged that the trusts were express, res-

pecting property clearly described, and still vested in the original trustee ; and that no rights of third parties intervened, upon which the bar of lapse of time could attach.

The bill further alleged, that the appellee had evidenced these trusts by writings signed by himself, had never made settlement of his trust, had never assumed a hostile attitude towards his *cestuis que trustent*, the heirs at law of the original *cestui que trust*, and that he had admitted the existence of the trust by writings signed by himself, executed in 1877 and 1880, in which he claims to have made settlements of such trusts in 1853, a date subsequent to that of the alleged creation of the trusts.

3d. The bill shows, also, not only that the appellee was the trustee of an express trust; but that he was vested with the legal title to lands in Alabama, in which he had admitted that the appellant's intestate had an equitable interest. (Record pages 35–38). It shows that he never repudiated this equitable title.

The existence of an outstanding equitable title to land in a third person may be proved by a party's parol admission.

Lewis vs Harris, 31 Ala., 689.

2 Wharton Ev. [2d ed.] Sec. 1092.

4th. The bill showed, also, that the cause was not open to the objection of laches or staleness.

The case falls within the exceptions to that doctrine as expressed by this court in Godden vs Kimmel, 99 U. S. 201.

The trust is clearly express, the trustee is the *original* trustee; the real property has never changed ownership; no equities of third persons have intervened, and there need be no consideration of disturbing or doing possible injustice to innocent parties.

The doctrine, *expedit rei-publicae ut sit finis litium*, is invoked to prevent injustice, never to further it, and does not apply to a case where there is no room for conjecture even as to possible injustice. +

Morse vs Royal, 12 Ves. Jr. [374.]

The case made by the bill shows a partnership, which never had other members than the appellee first named and the appellant's intestate; that said partnership business was not of a commercial nature, requiring skiil and large capital in its conduct; but only that of saloon keeping for the sale of liquor, a business in which a fixed quantity of liquors is continually dispensed at retail and replenished, whilst the profits are free for investments. The bill shows that said *appellee had no other source* of income than this saloon business, and shows the lands in which the proceeds of the business were investsd by the appellee. Six parcels of these lands are directly admitted by the appellee to belong to appellant's intestate jointly with himself, (Record page 35).

The other parcels are indirectly admitted to belong to appellant's testator, with the exception of the building on the north west corner of Royal and Conti streets in Mobile, by the affidavit filed by him January 30, 1880, in the present cause, (Record page 25).

+ "The true operation of length of time is by way of evidence."

The bill, also, shows that the appellant's testator was the appellee's brother; ignorant of the English language; for a long period of time absent in Corsica; with few acquaintances and of straitened means after his return to this country in 1856. Certainly if these facts are true, the parties can be restored to their original positions without doing injustice to innocent third parties.

Peabody vs Flint, 6 Allen 57.

Laches constitute, moreover, a complete defence when the complaining party has slept so long over his wrongs, that, if relief be given to him, great and serious harm will be done his adversary.

Duggers vs Van Dyck, 10 Stewart, 130.

Mere submission to an injury for any time short of the period for the enforcement of the right of action cannot take away such right.

Burden vs Stein, 27 Ala., 104--116.

De Busche vs Alt. L. R. 8 ch. D. 286, 314, cited in 2 Pomeroy Eq. Jur. 499, Sec. 965.

No serious harm can be done by making the appellee convey to the rightful owners, their father's interest in lands vested solely in the appellee. In fact it cannot be shown that any harm will be done him. He will have been required simply to give up that which did not belong to him at any time, and which can be identified *in specie*, as well now as when he first took the titles to himself.

5th. The $10,000 admitted by the appellee to be in his hands drawing interest (Record pages 32--34, exhibits B, and D.) and the half of the $8,000 of profits also admitted by him to be in his possession, (Record pages 33--35, exhibits C and E,) fall clearly within the cases of Payne vs Gardiner, 29 N. Y. 146; Boughton vs Flint, 74 N. Y. 476.

In the case of Payne vs Gardiner, the acknowledgment of the money claimed by the plaintiff, was made by the defendant, 9th May 1848. The action was commenced in 1861.

In Boughton vs Flint, the defendant received the monies for the plaintiff's account April 15th, 1859. The plaintiff made demand not earlier than January 20th, 1872.

The court overruled the pleas of limitations in both causes, on the ground that where one assumes the keeping of a fund for another, the statute of limitations does not begin to run until there has been a demand made upon the custodian, and the latter begins to hold adversely.

III.

The court erred in sustaining the demurrer to the amended bill numbered "1," (Record page 40), which seems to be to the effect, that there is no privity between the appellant and demurrant entitling the former to demand an accounting from the latter, under the allegations of the bill. The bill showed that the demurrant is a trustee, and that the appellant is an heir of the *cestui que trust*, demanding an account of the trustee All the other heirs and the administratrix are made parties to the bill. The trustee's claims descended to his widow and children.

Code, Ala., 1876, Secs. 2252, 2261.

IV.

There was error in sustaining the demurrer numbered "2," (Record page 40). It is a "speaking" demurrer. It alleges "loss of evidence, of memory, and the proper means of correct decision" which are facts *dehors* the bill, and the subjects of answer and proof.

V.

The court erred in sustaining the demurrers numbered "3," and "4," which go to the sufficiency of the allegations of the trusts. (Record page 41). The letters exhibits B. C. D. E. to the amended bill, [Record pages 32--35], and the two writings made by the demurrant, dated April 26th, 1879, and January 30th, 1880, shown in exhibit "F," to the bill, [Record pages 35--37], and in exhibit "G," thereto, [Record pages 38--39], sufficiently evidence the trusts.

1. The writing, exhibit "A," is called by the appellee, a *motion* to the lower court praying for the rescinding the order of January 17, 1880, allowing the appellant to amend the bill. It is much more than a motion. It is, in fact, in the nature of a plea of previous settlement of the trusts, and of an answer.

In the answer the appellee denies that the piece of real property at the corner of Royal and Conti streets, in Mobile, was purchased with trust moneys, and assert that it was purchased wholly with his own money. By implication he admits that the other 26 pieces of real property were purchased with trusts moneys, [Record pages 3, 9--12]. He nowhere *denies that said lands were bought with Angelo's money*; but pleads, that he made a settlement with said Angelo in 1853, and that said Angelo was indebted to him.

The admission of a settlement made in 1853, is an admission of the trusts themselves as charged in the bill. Whether such settlement had been made in fact is the subject of the controversy and is matter of PROOF, and not of demurrer.

A trust may be evidenced by an answer in chancery.

Browne Stat. of Frauds, (3d ed.) §§ 100–103.

1 Perry on Trusts, (3d ed.) § 82.

Muckleston vs Brown, 6 Ves. Jr. 52, (68).

Collins vs Decker, 70 Me., 23, (33).

2. By the same authorities the writing exhibit "F" is an admission of the trusts charged in the bill, made by the demurrant equally as striking as is exhibit "G," (Record pages 35–37). It was denominated a petition to be allowed to inspect documents, and was made in the State chancery court, as the bill shows, in a cause involving the same trusts, and the same parties. It does not deny the creation of the trusts, but simply expresses inability to answer whether or not the petitioner has EVIDENCED the trusts by wrltings as alleged. But the present acknowledgment of the trusts was sufficient to establish them, since the effect of writings is NOT TO CREATE, but only to EVIDENCE trusts.

3. The letters written by the demurrant appellee, exhibits B, C, D and E, are sufficient evidences of trusts charged in the bill. (Record pages 32–35).

1 Perry on Trusts, (3d ed.) § 82.
Browne Stat. of Frauds, (3d ed.) §§ 98-99.
4 Kent Com. (11th ed.) 305, *page.
2 Wash. Real Prop. (3d ed.) 468.
McClellan vs McClellan, 1 Law and Eq. Rep. 365.
Packard vs Packard, 2 Id. 429.
Macubbin vs Cromwell, 7 Gill and Johns, 157.
Barrell vs Joy, 16 Mass., 221.
Huddleston vs Briscoe, 11 Ves, Jr., 583.
Foster vs Hale, 3 Id. 696. S. C. 5 Id. (315), (322).
Fowle vs Freeman, 9 Ves. Jr., 351.
Coles vs Trecothick, Id. (250).
Halley vs Grant, 13 Id. 74.
Stratford vs Bosworth, 2 Ves. and Beames, 341.
Weston vs Russell, 3 Id. 187.
Ogilvie vs Foljambe, 3 Meriv. 52.
Kennedy vs Lee, Id. (450).
Gordon vs Gordon, 3 Swanst. 434, note.

VI.

The demurrer numbered five should not have been sustained. (Record page 41).

1. Limitations are purely creatures of statute.
U. S. vs Thompson 98, U. S. 489.

There is no statute, and there never has been in Alabama, a statute of limitations applicable to an express trust.
Greenlees vs Greenlees, 62 Ala. 330, (332).
Coyle vs Wilkins, 57 Id. 108 (111).
Pinkston vs Brewster 14 Id. (321)
Maury vs Mason, 8 Port. 211.

If the bill shows an express trust, it shows a cause which cannot be barred by mere lapse of time.

But the writings, exhibits B, C, D, E, F and G, are sufficient declarations and evidence of an express trust, by the authorities cited in Division V.

Such trust can only be barred by the open and notorious holding of the trustee, adversely to his CESTUI QUE TRUST, long enough to raise the presumption of settlement.
2 Perry on Trusts, (3d ed.) §§ 863, 866, 871.
Clarke vs Boorman's exr. 18 Wall., 509.
Alexander vs McMurray, 8 Watts (Pa.) (509.)
Jones vs Person, 2 Hawks (N. C.) (290-1).

In Beaumont vs Boultbee, 5 Ves. 492, an account was directed in 1800 which would commence in 1760. In Townsend vs Townsend, (1 Cox, 28-34), in Bedford vs Wade, (17 Ves. 87-97,) and Gregory vs Gregory, (Sir G. Cooper 201) this distinction is taken between an attempt to raise a constructive trust upon transactions closed many years before, and a direct trust of which the transactions are not closed. "In Chalmers vs Bradley, (1 Jac. & W. 51), Sir Thomas Plumer not only recognized it; but 45 years after the testator's death directed inquiries with the view, if they should prove favorable to the claim of the *cestui que trust*, to afford him some relief. In this case the necessity for previous inquiry does not exist."

Wedderbern vs Wedderbern, 4 Myl. and Cr., 53.

The appellee is the original trustee, and still in sole possession of the trust property. No equities of third persons have attached.—"Length of time weighs less here than in any case. The account can be taken now as well as at any time."

Beaumont vs Boultbee, 5 Ves. 492, 494.

2. Time, moreover does not run against settlements of *partnership affairs* until there has been an account stated between the partners.

In Wedderbern vs Wedderbern, *supra*, an account of a deceased partner's estate was directed after a lapse of 30 years, repeated changes in the firm, and after several deeds and a release had been executed by the parties beneficially interested.

In that case it was said, on appeal, 2 Keen, 750). "It is plain that the accounts were never finally settled and that the relation between trustee and CESTUI QUE TRUST has not yet wholly terminated."

"An account closed is not necessarily an account stated and liquidated. It may become closed by the death of one of the parties, which is clearly not a statement, and still less a settlement."

Angell on Limitations, 139, § 150.

3. If a direct trust could be barred by lapse of time, yet in this case the time running against the appellant is less than twenty years, which the courts of Alabama say are required to bar an implied trust.

The bill shows that the property was placed in the appellee's hands by his brother, Angelo, in 1845, and that the latter went to Europe and did not return until December, 1856.

If time has been running adversely to Angelo, it could not have commenced to do so earlier than December 1856. From December 1856 to October 20th, 1879, the date of filing of the bill, the period of the war must be deducted, viz: from April 19th 1861, to April 2d, 1866.

Hanger vs Abbott, 6 Wall. 532.
Semmes vs Ins. Co., 13 Id. 158.
Murray vs. Charleston, 96 U. S. 432.
Williams vs Bruffy, Id. 176.
Ross vs Jones, 22 Wall. 587.
Brown vs Hiatts, 15 Id. 177.
The Protector, 12 Id. 700.
The Protector, 9 Id. 687.
Bird vs Lou, State Bk. 93, U. S. 96.
Smith vs Melton, 5 Rep. (239).

The maximum time of hostile attitude elapsed possible, is *less than eighteen years*.

But twenty years are required in Alabama to raise the bar of a presumption of a settlement of an *implied* trust.

Coyle vs Wilkins, 57 Ala. 108.
Harrison vs Heflin, 54 Id. 552.
Raglands Ex. vs Morton, 41 Id. 344.
Worley vs High, 40 Id. 171.
Blackwell vs Blackwell, 33 Id 57.
McArthur vs Carrie, 32 Ala. 75.

And, moreover, in that State, courts of equity do not follow the Statute of Limitations at law.

Flinn vs Barber, 61 Ala. 530.
Bizzell vs Nix, 60 Id. 281.

And courts of equity generally do not follow the law even as to limitations, when manifest wrong and injustice would be wrought by so doing.

Fogg vs R. R. Co., 17 Fed. Rep. (873).

Nor do Federal courts follow the State courts in matters of limitation in equity.

Robinson vs Campbell, 3 Wheat, 212.
Payne vs Houk, 7 Wall. 429.

Johnston vs Roe, 1 McCrary, 162.

4. If the bill shows the existence of a trust and indicates that there has been fraud or concealment, or a taking advantage of the circumstances of the *cestui que trust* in the execution thereof, by the trustee, the appellant would be entitled to relief without any averments of fraud in the bill.

1 Dan. Chan. Prac. [4th Am. ed.] 667, Notes 6-11.

Barrell vs Hanrick, 42 Ala. 60.

Kennedy vs Kennedy, 2 Id. 571.

Jarnam vs Brooks, 9 Pick. 212.

Barrington vs O'Brien, 1 Ball & Beatty, 173.

"An account will be opened for fraud after a settlement, even after a lapse of twenty-three years."

1 Dan. Chan. Pr. [4th Am. ed]., 667.

Michaud vs Girod, 4 How. [561.]

Marks vs Pell. 1 Johns Ch. 594.

5. All of the lands described in the bill are subject to the appellant's demands, because such as have not been expressly admitted to be equitably owned by appellant's intestate are shown to be purchased with his trust moneys. A direct trust cannot be changed into a constructive trust by the trustee's converting the subject matter thereof into some other form of property. The *cestui que trust* can follow trust property if not held by a *bona fide* purchaser for value, without notice, or he may pursue the proceeds, or the substituted property.

Cook vs Tullis, 18 Wall. 332.

Oliver vs Pratt, 3 How. 333.

Lehman vs Lewis, 62 Ala. 129.

Perry on Trusts, [3d. ed.] §§ 447, 835, 836.—

6. The writings made by the appellee, Philippe, shown as exhibits "F." and "G." [Record pages 35-39], contain admissions of the existence of the trusts charged in the bill, made in the one case within five years of the filing of the bill, in the other made during the pendency of the suit.

VII,

It was error to sustain the demurrer numbered "6," [Record page 41.]

A suit pending in a State court is no bar to an action between the same parties for the same cause in a Federal court. The courts of the United States are foreign to those of the States for the purposes of the plea of autre action pendant.

Gordon vs Gilfoil, 99 U. S. [178].

Insurance Co. vs Brune, 96 Id. [592].

Stanton vs Embrey, 93 Id. [554].

Dwight vs R. R. Co., 9 Fed. Rep. [789].

Logan vs Greenlaw 12 Id. 10.

Slaughter House Case, Id. 226.

Weaver vs Field, 16 Id. 22.

Lynch vs Hartford & S. Co., 17 Id. [628].

Nor is an adjudication upon demurrer to a bill, a judgment upon the merits of the cause, necessarily barring another action thereupon.

Aurora vs West, 7 Wall. 99, [103].

Gilman vs Rives, 10 Peters 298.

Richardson vs Boston, 24 How. 88.

Freeman Judgments [2d ed.] § 267.

Wells. Res. Adjud., § 446.

The judgment of the Supreme Court of Alabama in Philippi vs

Philippe shows that the demurrer was sustained on account of the insufficiency of allegations of the bill, and that the judgment was not on the merits. This was the only final adjudication of the cause in the State court and controls the extent thereof.

Griffin vs Seymour, 15 Iowa 33.

A judgment to be a bar must be full and upon the *merits* of the cause.

Hughes vs U. S., 4 Wall. [237].

Gould vs R. R., 91 U. S., 533.

VIII.

The court erred in sustaining the demurrer numbered "7," [Record page 42].

The affidavit made by said demurrant, January 30th, 1880, was filed in support of a motion made in the cause, and, although, not technically a legitimate part of the pleadings, yet had been interjected into them by the demurrant, and was in fact in the nature of a plea.

In the first place the bill charged that demurrant kept several saloons in partnership with his brother and owned several pieces of real property in common with him. The affidavit singles out one saloon and one piece of real property for denial, admitting thereby the truth of the allegations of the bill respecting the other saloons and other pieces of real property. A denial which covers only a part of the allegations of a bill is an admission of the parts not so covered.

Secondly. Demurrant admits that a full settlement was had between him and his brother subsequent to 1845, the date of the creation of the trusts. This is an admission of the existence of the trusts *at that time*. The claim of settlement had by demurrant with his brother is matter of proof, and is simply a plea of payment and release, whilst admitting the liability charged by the bill, to have once existed as charged.

The court erred in sustaining the demurrer numbered "8," [Record page 42].

The bill alleges that Angelo forbore from resorting to legal measures because the demurrant was his brother, and he was unwilling to litigate with a brother.

Delay in instituting proceedings, where the parties are members of the same family, is not so strictly regarded as where the parties are strangers to each other.

2 Story Eq., Jur. [10th ed.] Sec. 1520,d.

And the presumption of any settlement between the demurrants and his brother Angelo, or of any release made by the latter to the former, is weakened by the poverty of the latter after his return from Europe.

2 Perry on Trusts [3d ed.] Sec. 867.

2 Pomeroy Eq. Jur. Sec. 964 n. 1.

Respectfully submitted,

Luther Smith

FREDERICK G. BROMBERG,
Of Counsel for the Appellant.

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Supreme Court of the U. S.

OCTOBER TERM, 1884.

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JAMES S. PHILLIPPI, APPELLANT,

vs.

ANTONIO PHILLIPPI, ANGELA PHILLIPPI, WIDOW AND ADMINISTRATRIX OF A. M. PHILLIPPI DECEASED, AND SEVERAL CHILDREN, AS DEFENDANTS AND APPELLEES.

Appeal from the Circuit Court of the United States for the Southern District of Alabama.

J. A. CAMPBELL,
Of Counsel for Appellee, A. Phillippi.

JOHN MURPHY & CO., PRINTERS, BALTIMORE.

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AS DEFENDANTS AND APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

I.

A STATEMENT OF THE PARTIES, AND THE OBJECTS OF THIS SUIT.

The plaintiff is a son of Angela Phillippi and A. M. Phillippi, deceased; and is the brother of the remaining defendants, except Antonio Phillippi, who is his uncle, the brother of his deceased father. His contest is with this uncle, and the defendants other than Antonio have the same interest as the plaintiff. The pleadings consist of the bill, an amended bill and exhibits. The

defendant demurred to the bill and amended bill and it was dismissed by the Circuit Court on the demurrer. Before this bill was filed the heirs of the said A. M. Phillippi, consisting of all of his children, and his administratrix, their mother, filed a bill in the Court of Chancery of the State of Alabama, at Mobile, against Antonio Phillippi, one of the defendants, having for its object all that is disclosed in this suit, and seeking the same relief as the plaintiff in this suit asks for himself in connection with the administratrix and his brothers and sisters, heirs of A. M. Phillippi, deceased. The suit in the Court of Chancery was pending, and undecided, when this suit was commenced in the Circuit Court of the United States. The case in the Court of Chancery is alike this case, the only difference to be seen between the case in the Court of Chancery, and the case exhibited in the bills filed in this case, is in the position of the parties. This plaintiff alleges that he is a citizen of Louisiana, and the other members of his family being citizens of Alabama, could not unite with him to sue Antonio Phillippi, were introduced into this suit as defendants, but no relief is sought for against them. There was a general demurrer to the bill in the case in the Court of Chancery, and the chancellor dismissed the bill, as the circuit judge did in this case. The Chancery decree was removed by appeal to the Supreme Court of Alabama and was affirmed.

The report of the case is to be found in 61 Alabama Reports as the case of Phillippi vs. Phillippi, pp. 41, where the demurrer is supported and the decree affirmed.

Facts Collected from the Bill of the Plaintiff.

A. M. Phillippi, the father of the plaintiff, emigrated from Corsica, the Republic of France, in 1835, and settled in Mobile. He kept a saloon and boarding house from that date till 1845. He was naturalized in 1840. His brother joined him in 1840 and had connection with him in business. In 1845, A. M. Phillippi

returned to Corsica, and the business was left to the charge of Antonio. Of what took place in Corsica during the stay of A. M. Phillippi after 1845 we have no statement, save what appears in two letters appended as exhibits to the amended bill, and written by Antonio to his brother in Corsica. It appears from the two letters that A. M. Phillippi had a wife in Corsica, and that some accusation, imputation or inquiry arose in Corsica relative to the state of his domestic relations in Alabama while he resided there. In a letter dated in May, 1847, he sends to the brother four certificates. 1. Certificate of the Mayor that A. M. Phillippi had not married in Mobile nor in Alabama. 2. A certificate from a notary that Antonio held $10,000 belonging to A. M. Phillippi. 3. A certificate of a lawyer that one who is not naturalized cannot hold property of any kind. 4. A certificate that Angel Maria Fillippi is the Italian name corresponding to Angel M. Phillippi.

It appears in this letter that the French consul was charged to make examination or inquiry. The second letter, dated in March, 1848, shows that A. M. Phillippi was still in "trouble" in Corsica, and was a cause of anxiety to Antonio. The bill states that A. M. Phillippi returned to Mobile in 1856.

In an affidavit appended to the amended bill it is said that he visited Mobile in 1853, and had a settlement with Antonio.

In each one of these letters Antonio comforts his brother with statements of the favorable condition of his affairs and of his affection for him. He speaks of purchases he had made of real estate and of profits realized, and states the amounts due to A. M. Phillippi, and the bill charges that these are evidence of an express trust and establish relations of trustee and cestui que trust.

It appears from the bill that on the return of A. M. Phillippi there were no relations of partnership between the brothers continued; that A. M. Phillippi made no effort to establish a title to property held by Antonio. All the real property was held under conveyances made to Antonio, and appear on record in the Court of Probate.

The only communications from Antonio to A. M. Phillippi produced to the Court are those attached to the amended bill. Record, pp. 32–35, dated in 1847–8.

The affidavits of Antonio attached to the amended bill show that A. M. Phillippi before his death declared his insolvency and this was acknowledged by creditors, who yielded the property reserved from creditors. At no time after his return was he in prosperous conditions. He died in 1874. During eighteen years from the return in 1856 and twenty-one years after his return in 1853, he made no suit of any kind and had no acknowledgment of any title and had no possession.

Administration was taken in 1877, and the suit in the Chancery Court of the State was commenced which terminated in the dismissal of the bill on a general demurrer. This suit was commenced in the Circuit Court in 1879. This was above thirty years from the date of the letters of Antonio in 1847 and 1848 to the United States, and twenty-three years from the return alleged in the bill to have been made in 1856.

The deeds of property to Antonio are recorded describing his purchases; his possession has conformed to these titles and has not been disputed by the opposing parties.

Demurrers of the Defendant.

The defendant demurred to the bill for want of Equity.

The causes of demurrer assigned are the Statutes of limitations of the State of Alabama. By the code of Alabama the Statutes is the same in Chancery as at law, and actions for account and bills for account are subject to the same limitation.

Code of Alabama, sections 3224, 3274, 3758.
Nettles vs. Nettles, 67 Ala. R., 599.
Goodwyn vs. Baldwyn, 59 Ala.
Askew vs. Hooper, 28 Ann., 636.
Phillippi vs. Phillippi, 61 Ala., 41.

L. Rep., H. L., 656.
Wagner vs. Beard, 7 How., 234.
2 Story Eq., sections 1884, 1520.
Noyes vs. Crowley, 10 Ch. D., 31.
Coudrey vs. Gelliam, 60 Missouri, 86.

2. The only party competent to maintain this suit as a plaintiff is the administratrix. The legal right, were there any, is vested in the personal representative. No misconduct appears on her part which calls for equitable intervention.

Wilson vs. Moore, 1 M. & K., 142.
Stainton vs. Carron Co., 18 Beav., 146.
Yeatman vs. Yeatman, 7 Ch. D., 210.
1 Dan. l. Ch. Pr., p. 241.
Dodge vs. Walsey, 18 H., pp. 367–369.

3. The plaintiff is bound by the lapse of time—*laches*—the absence of valid evidence of title or of a trust.

Phillippi vs. Phillippi, 61 Alabama, p. 41.

J. A. CAMPBELL,
Of Counsel for Appellee, A. Phillippi.